Supreme Court, U.S.
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No. 03 - 18 JUL 1 - 2003

In the Supreme Court of the United States

ADRIAN D. HORIEN,

Petitioner,

v.

CITY OF ROCKFORD,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR A WRIT OF CERTIORARI

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

ALAN UNTEREINER*
ARNON D. SIEGEL
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioner

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QUESTIONS PRESENTED

Rockford, Illinois, makes it a misdemeanor to "cause or create," at "any time," "any noise" that is (a) "unnecessary or unusual," and that (b) "annoys" another person or "endangers" or "injures" another's "comfort" or "repose." Petitioner was convicted based on his participation in a peaceful protest, during daylight hours, on a public sidewalk outside an abortion clinic in a commercially zoned area of Rockford. The "annoying noise" he was punished for making was the sound of his own unamplified voice, used to chant or shout statements of moral opposition to abortion towards people who were entering the clinic from an adjacent parking lot some distance away. Petitioner's repeated message ("Mommy, daddy, please don't kill me") was delivered in a falsetto in order to imitate the cry of a child, and he used a loud voice because the clinic was broadcasting music at the protesters over loudspeakers to drown them out. This case presents the following questions:

1. Whether the decision below should be summarily reversed, or at least reviewed by this Court, because it is at odds with (a) *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), which held that a ban on "annoying" behavior is facially unconstitutional under the Due Process Clause and First Amendment, and (b) numerous other lower-court decisions.

2. Whether the Rockford "nuisance noises" ordinance is content based and thus subject to strict scrutiny, or instead is a content-neutral "time, place, or manner" restriction that is narrowly tailored to serve a significant governmental interest and leaves open ample alternative means of communication.

3. Whether the Rockford ordinance, as applied to petitioner, violates the First Amendment because it punishes the use of an unamplified human voice during a peaceful political protest on a public sidewalk, where the features that make the speech "annoying" and thus unlawful are inextricably linked to the protester's message (the falsetto) or necessary to overcome efforts by the intended audience to drown out the protester's message (the loud volume).

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OPINIONS BELOW

The opinion of the appellate court (App., *infra*, 1a-9a) is unreported. The order of the Supreme Court of Illinois denying leave to appeal (App., *infra*, 10a) is unreported.

JURISDICTION

The judgment of the appellate court was entered on December 20, 2002. The order of the Illinois Supreme Court denying leave to appeal was entered on April 2, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." The City of Rockford's "nuisance noises" ordinance (Rockford Code of Ordinances ch. 17, § 17-10(a)) provides, in pertinent part, that "[i]t shall be unlawful to cause or create any unnecessary or unusual noise at any time which annoys, injures, or endangers the comfort, repose, health or safety of others, unless such noise is necessary for the protection or preservation of property, or the health, safety, or life of some person." Other pertinent provisions of the Rockford anti-noise ordinances are set forth at App., *infra*, 11a-15a.

STATEMENT

The City of Rockford, Illinois, makes it illegal – punishable by fines and imprisonment for up to six months – to "annoy" someone with "unusual" or "unnecessary" noise. But that could mean anything, since there's always someone annoyed by almost everything. Petitioner apparently "annoyed" someone as he protested on a public sidewalk outside an abortion clinic because he spoke loudly and in falsetto; the same ordinance would cover Placido Domingo if he annoyed someone when singing "Quand'ero paggio" from Verdi's *Falstaff* or any "annoying" performance partly in falsetto by the Bee Gees or Frankie Valli.

No one faced with such a law could possibly know whether he might be breaking it – and the law would proscribe quintessential political speech that causes some annoyance in a listener.

For precisely those reasons, this Court ruled in *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), that a prohibition on annoying others is unconstitutionally vague in violation of the Due Process Clause and unconstitutionally overbroad in violation of the First Amendment. Scores of cases have followed *Coates*, striking down on vagueness and overbreadth grounds noise ordinances indistinguishable from Rockford's. In upholding petitioner's conviction, the Illinois Appellate Court simply ignored *Coates* and its progeny and relied instead on two fifty-year-old Illinois Supreme Court decisions that predate the relevant decisions of this Court. The Court should grant the petition and summarily reverse. At a minimum, this Court should address the important constitutional issues raised in this case.

1. Petitioner Adrian Horien opposes abortion on moral and religious grounds. On the morning of June 8, 2001, he and others stood on the public sidewalk near the entrance to a driveway leading to the Northern Illinois Women's Center in Rockford, a clinic that provides abortion services. Mr. Horien and his fellow protesters sought to communicate the message that abortion is wrong, and he called out in a loud, falsetto voice to people entering or leaving the clinic from a parking lot adjacent to the clinic entrance. Robert Stone, who lived a block away from the clinic, approached petitioner and asked him to lower his voice because the sound of petitioner's voice was allegedly bothering Stone in his home. When petitioner refused, Stone called the police, who came to the clinic and issued Horien a citation for violating the Rockford ordinance by "annoying and disturbing the comfort of Robert Stone." App., *infra*, 2a.

2. Proceeding *pro se*, Mr. Horien filed a motion to dismiss the charge or in the alternative for a declaratory judgment. In his supporting brief, petitioner argued that the Rockford ordinance – both on its face and as applied to him – violated the First and Fourteenth Amendments to the United States Constitution because it was unduly vague and infringed his free speech

rights. Among other authorities, petitioner cited *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971).

The City contended that the ordinance is not void for vagueness and that it constitutes a reasonable "time, place, or manner" restriction that targets noise rather than speech. The City maintained that *Coates* is distinguishable because Rockford's ordinance prohibiting "annoying" noises is "much more narrowly tailored" than the ordinance struck down in *Coates*, which prohibited persons from conducting themselves on a public sidewalk "in a manner annoying to persons passing by." See Rockford Br. in Opp. to Defendant's Motion, at 5.[1] The trial court, after a short hearing, denied petitioner's motion without explanation. See 10/29/01 Tr. 17.

3. At a bench trial, the City called as its first witness Robert Stone. Mr. Stone, a cartoonist, testified that on the morning of June 8 he had been supervising some remodeling work as he prepared to work from his home a block away from the clinic. With rotary floor sanders blasting on the first floor, and his windows closed, Stone testified, he heard someone "shouting very loudly, very annoyingly from down the street."

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[1] The City also invoked *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a vagueness challenge to a far narrower Rockford anti-noise ordinance that prohibited the willful making of a "noise or diversion" during school hours on property adjacent to a school, if the noise "disturbs or tends to disturb" the school session. This Court noted that the constitutional question in *Grayned* was "close," and it relied on the fact that the Illinois courts had interpreted the phrase "tends to disturb"– which on its own "might be troubl[ing]" in its "imprecision" – quite narrowly to include only those situations where there was an "imminent threat of violence." *Id.* at 110-11 (quoting *Chicago* v. *Meyer*, 44 Ill. 2d 1, 4 (1969), cert. denied, 397 U.S. 1024 (1970)). Moreover, the Court noted, the Rockford ordinance at issue in *Grayned* was "written specifically for the school context" and not "a vague, general 'breach of the peace' ordinance." *Id.* at 112. Finally, the Court distinguished *Coates* on the ground that the statute there "was impermissibly vague because enforcement depended on the completely subjective standard of 'annoyance[]'" whereas the Rockford school disruption ordinance "prohibited disturbances" that were "easily measured by their impact on the normal activities of the school." *Ibid.* In this case, the City has never disputed that its "nuisance noises" ordinance embodies a subjective standard.

12/12/01 Tr. 8; see also App., *infra*, 2a. Stone admitted that "[t]here's usually some noise from" the direction of the clinic because of frequent protests, but indicated that "there was a lot more noise on this particular day." 12/12/01 Tr. 7-8. Stone walked to the clinic and asked petitioner to "stop yelling." *Id.* at 10. After petitioner refused on the ground that "what he was doing was very important," Stone took offense at "the way [Horien] spoke to me" – but not, Stone took pains to add, "the words he used" – and Stone returned home and called the police. *Id.* at 11-12. Asked whether he had complained because of the content of Horien's message, Stone acknowledged that he knew of petitioner's views on abortion. He insisted, however, that "[m]y politics didn't enter it." *Id.* at 11. He was annoyed, rather, by the "volume" of Horien's voice. *Id.* at 11, 16.

Michael McDonald, the police officer who issued the citation, testified that, at the scene of the protests, he spoke with petitioner, who admitted that he had been using a loud voice to convey "his opinion to the patients coming and going from the clinic." 12/12/01 Tr. 19; see also App., *infra*, 3a. Consistent with Stone's complaint, McDonald stated that the "volume" of Horien's protests – and no other features – had resulted in a violation of the ordinance. *Id.* at 20-21.

Finally, the City called Wayne Webster, the owner of the building that houses the clinic. Webster testified that he was inside the clinic building in his security office, located on the second floor at the point where the building was only about 40 feet away from the protesters, when he heard loud noise coming from the street. 12/12/01 Tr. 24-25, 39, 45. Although Webster admitted that protests took place regularly at the clinic, and that on the day in question others were also protesting loudly, he testified that the others "weren't nearly as loud" as Horien. *Id.* at 26; see also App., *infra*, 3a. In addition, Webster testified, it was Horien's "falsetto, high-pitched voice" that "was so loud and so obnoxious and so annoying" to him and that made it "different" from other loud voices of protest. 12/12/01 Tr. 26, 35. Specifically, Webster noted, petitioner had used a loud

falsetto to chant "Mommy, daddy, don't kill me" as well as communicate other messages "of that nature." *Id.* at 36.[2]

After the City rested, Mr. Horien called William Landerholm, who had joined him on June 8 in protesting outside the clinic. Landerholm testified that on the morning in question the protesters were taking turns "lifting up our voices" so that their messages would "carry over to the parking lot to the women" going into the clinic entrance and "to overcompensate for the noise that normally comes out of the building." 12/12/01 Tr. 52-53; see also App., *infra*, 3a. Landerholm further testified that Webster regularly played music or the radio over an outdoor public address system and was doing so on the morning of June 8, and "[w]e believe it's to drown us out so that the clients cannot hear what it is that we have to say." 12/12/01 Tr. 53, 55. Landerholm also agreed that the amplified sound emanating from the building was loud enough to drown out "any human voice from the sidewalk addressing the people where they normally walk near the building," and he noted that the building's loudspeakers had been the subject of complaints in the past by neighbors. *Id.* at 53, 55. But for Webster's broadcasts over the loudspeakers, Landerholm testified, he would keep his voice low: "I would like not to have to shout to the women. In fact, I think it's counterproductive to why we are there." *Id.* at 56.

Landerholm also testified that the protest was entirely peaceful and "no louder" than any of the 100 or so previous protests outside the clinic. 12/12/01 Tr. 56, 59. He noted that Stone had never before complained about the noise of these pro-

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[2] Webster also testified that, when standing at the window in his security office (even with the window closed), he could hear petitioner engaged in normal conversation, because petitioner's conversational voice is "loud" and because the windows in the security office "are huge," made of "hundred-year-old glass," and "[s]ome of the caulking is bad in them, and there's no seal around them." 12/12/01 Tr. 45-46, 50; see *id.* at 50 ("[I]t's like standing in a park, [sound] just reverberates through the place"). The prosecution also introduced into evidence a videotape of the protests prepared by Mr. Webster.

tests, and appeared to be "very angry" and "very agitated" when he complained to Horien. *Id.* at 54, 58-59.

Petitioner also testified. He explained that he had used "various means in communicating our message" because "[w]hat speaks to one person doesn't speak to another person as effectively." 12/12/01 Tr. 61. By using the falsetto voice, he explained, he was "aiming" to "communicat[e] to the people a specific message that there is a human being * * * whose life will be terminated" if an abortion takes place. *Ibid.* Petitioner acknowledged that his "voice" was not the only means available to communicate his general opposition to abortion. *Id.* at 65.

The evidence also established that the clinic was located in an area zoned for commercial rather than residential uses. 12/12/01 Tr. 37-38. There was no evidence that any patient or employee of the clinic had been "annoyed" or that the operation of the clinic was in any way disrupted. Nor was there any evidence that petitioner was engaging in conduct that was threatening or anything other than entirely peaceful.

After the close of evidence, petitioner renewed his constitutional objections. 12/12/01 Tr. 70-76. Petitioner also argued that it was "quite incredible" that Stone, who lived "a full city block" away, could have heard and been annoyed by his voice through a closed window and over the din of power sanders operating on the floor below. *Id.* at 70.

The court held that Mr. Horien had violated the noise ordinance. In the judge's view, the case "was not about the content * * * of the speech, but the volume level." 12/12/01 Tr. 77. The court also stated that petitioner had "other methods" available for conveying his general opposition to abortion. *Id.* at 78; see also App., *infra*, 3a. The judge imposed fines (and costs) against Horien in the amount of $100.

4. The appellate court affirmed in an unpublished opinion. App., *infra*, 1a-9a. Without citing *Coates*, the court rejected petitioner's vagueness challenge, relying principally on two fifty-year-old Illinois Supreme Court decisions that involved industrial zoning ordinances. App., *infra*, 5a-6a (citing

City of Chicago v. *Reuter Bros. Iron Works*, 75 N.E.2d 355 (Ill. 1947), and *Dube* v. *City of Chicago*, 131 N.E.2d 9 (Ill. 1955), cert. denied, 350 U.S. 1013 (1956)). The appellate court also reasoned that the "plain language of the [Rockford] noise ordinance gives fair notice to the public and to the City that noise creating a nuisance is prohibited." *Ibid.*

Next, the Illinois appellate court rejected Mr. Horien's First Amendment challenge. It held that, although it obviously regulates protected speech, the ordinance is a valid time, place, or manner restriction. The ordinance is content neutral, the court held, because it "does not mention any type of speech" (such as advertising); the court did not address the ordinance's exception for protecting property and the lives of other persons. App., *infra*, 7a. Moreover, the court stated, the government has a significant interest in "regulating noise," and the ordinance was narrowly tailored "because [it] prohibits only sounds creating a nuisance." *Id.* at 8a. The appellate court also rejected Horien's argument that he had no alternative means of communicating his message to patrons who were disappearing behind a "privacy fence," reasoning that "the people arriving at the clinic walked or drove past the protesters before entering the parking lot." *Id.* at 7a.

Finally, the court rejected Horien's challenge to the sufficiency of the evidence under the governing standard of proof (which required the City, in this "quasi-criminal" proceeding, to prove a violation by "a clear preponderance of the evidence"). App., *infra*, 8a. The appellate court did, however, agree with Horien that Robert Stone's testimony was "inherent[ly] implausibl[e]." *Id.* at 7a. Even though the trial court had erroneously "credited Stone's testimony," and even though Stone was the only person Horien was charged with "annoying," the appellate court upheld Horien's conviction on the basis of the videotape evidence and the testimony of Webster.

5. Horien petitioned the Illinois Supreme Court for leave to appeal, again raising his facial and as-applied challenges to the ordinance under the Due Process Clause as well as the First

Amendment. The Illinois Supreme Court denied leave to appeal without comment. App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION AND SUMMARILY REVERSING

The Illinois courts have upheld a "quasi-criminal" conviction and fine for engaging in core political speech that was "annoying" to someone who heard it because it was loud and high-pitched. Petitioner's offense consisted of standing on a pubic sidewalk, the quintessential public forum, in an area zoned for commercial use, and speaking about abortion, a quintessentially political topic, in a loud voice. He spoke during daylight hours. He spoke without electronic amplification, but raised his voice in order to be heard over amplified music broadcast by the clinic and intended to drown him out. And he spoke in a falsetto tone, imitating a child's voice, precisely in order to communicate his message effectively that abortion involves the death of children.

The decision below so far departs from this Court's settled jurisprudence that the Court should grant the petition for certiorari and summarily reverse. Even if the Court does not summarily reverse, it should grant the petition to address the important issues presented in this case.

I. Summary Reversal Is Warranted Because The Lower Court's Holding That Rockford's "Nuisance Noises" Ordinance Survives A Facial Challenge For Vagueness And Overbreadth Conflicts With Decisions Of This Court And Of Many Lower Courts

The appellate court has upheld petitioner's conviction under a municipal ordinance that makes it a misdemeanor – punishable by fines and incarceration of up to sixth months – to make "any noise," at "any time," in the City of Rockford, Illinois, if such noise is "unnecessary or unusual" and it either "annoys" some person or "endangers" or "injures" another's "comfort" or "repose." In rejecting petitioner's facial challenges on vagueness and overbreadth grounds to that penal proscription, the Illinois Appellate Court made no mention of this Court's bind-

ing decision in *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), which was discussed in the parties' briefs. Because the decision below cannot be reconciled with *Coates*, summary reversal is appropriate.

A. *Coates* involved a Cincinnati ordinance that made it a crime for "three or more persons to assemble * * * on any of the sidewalks" within the city "and there conduct themselves in a manner annoying to persons passing by." 402 U.S. at 611 & n.1. That ordinance, this Court wrote, is unconstitutionally vague, "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that *no standard of conduct is specified at all*." *Id.* at 614 (emphasis added). Because "[c]onduct that annoys some people does not annoy others," citizens "of common intelligence must necessarily guess at [the ordinance's] meaning." *Ibid.* (internal quotation marks omitted). Nor does it matter, this Court explained, that the Cincinnati ordinance "is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit." *Ibid.* Although Cincinnati "is free to prevent people from blocking sidewalks * * * or [engaging in] other forms of antisocial conduct * * * through * * * ordinances directed with reasonable specificity toward the conduct to be prohibited," it "cannot constitutionally do so through * * * an ordinance whose violation may entirely depend on whether or not a policeman is annoyed." *Ibid.*

The Court proceeded to conclude that Cincinnati's ban on "annoying" conduct "also violates the constitutional right of free assembly and association." 402 U.S. at 615. "The First and Fourteenth Amendments," the Court explained, "do not permit a State to make criminal the exercise of a right of assembly simply because its exercise may be 'annoying' to some people." *Ibid.* Were it otherwise, the Court added, "the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct." *Ibid.* "And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against

those whose association together is 'annoying' because their ideas, their lifestyle, or the physical appearance is resented by the majority of their fellow citizens." *Id.* at 616. Because the ordinance "makes a crime out of what under the Constitution cannot be a crime," it violated the First Amendment. *Ibid.*

This Court's decision in *Coates* represented a continuation of prior case law. In *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the Court overturned the convictions of a group of black protesters under a South Carolina "breach of the peace" law prohibiting "violation[s] of public order" and "disturbance of the public tranquility." Objecting to segregationist policies, the protesters had marched to the State Capitol and, after being ordered by the police to disperse or face arrest, had engaged in "loud," "boisterous," and "flamboyant" conduct, including "listening to a 'religious harangue' by one of their leaders, and loudly singing * * * patriotic and religious songs, while stamping their feet and clapping their hands." *Id.* at 233. In reversing the convictions, this Court explained that South Carolina's breach-of-the-peace crime was "so generalized as to be, in the words of the South Carolina Supreme Court, 'not susceptible of exact definition.'" *Id.* at 237. Any such penal statute, which "'upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment'" of an individual's use of "'the opportunity for free political discussion,'" is contrary to the First Amendment. *Id.* at 238 (quoting *Stromberg* v. *California*, 283 U.S. 359, 369 (1931)).

Similarly, in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), this Court overturned a "breach of the peace" conviction of the leader of a civil rights demonstration involving several thousand students. The alleged crime occurred when, after an orderly demonstration that nonetheless included the loud singing of hymns such as "We Shall Overcome" and loud clapping and cheering, the leader of the protest made the "inflammatory" suggestion that the assembled students should proceed to sit in at local lunch counters to protest racial segregation. *Id.* at 542, 546-49. This Court held that the "breach of the peace" offense – which made it a crime "to agitate, to arouse from a state of

repose, to molest, to interrupt, to hinder, [or] to disquiet" – was "unconstitutionally vague in its overly broad scope." *Id.* at 551.

In *Saia* v. *New York*, 334 U.S. 558 (1948), this Court reversed the conviction of a minister of the Jehovah's Witnesses for using sound amplification equipment (a loudspeaker) in giving a lecture in a public park, without first obtaining a permit from the police. The ordinance at issue made it a punishable nuisance, among other things, to use a loudspeaker in a way that produced "sounds" that "can be heard to the *annoyance* or inconvenience of travelers upon any street or public places." *Id.* at 558 n.1 (emphasis added), 560. That ordinance, the Court held, was "unconstitutional on its face." *Id.* at 559-60.

B. Since *Coates*, numerous lower court decisions have invalidated on either Due Process or First Amendment grounds local ordinances that punish behavior (or noise) on the ground that it may be subjectively "annoying" to others.

1. Illustrative of the void-for-vagueness cases is *State* v. *Indrisano*, 640 A.2d 986 (Conn. 1994), which involved a conviction for violating a statute that criminalized "offensive or disorderly conduct" that "annoys or interferes with another person." The Connecticut Supreme Court held that the statute was void on its face under *Coates*: "the Supreme Court of the United States has held that the term 'annoying,' when used to proscribe conduct, is unconstitutionally vague." *Id.* at 997.

Similarly, in *Thelen* v. *State*, 526 S.E.2d 60 (Ga. 2000), the Georgia Supreme Court, relying on *Coates*, reversed a conviction of someone who landed his helicopter on a dock and was charged with violating an ordinance identical to Rockford's. The court explained that "whether [such] noise * * * is 'unnecessary,' 'unusual,' or 'annoying' * * * certainly depends on the ear of the listener" and, accordingly, the statute was unconstitutionally vague as applied. *Id.* at 62. The Supreme Court of Alaska reached a similar conclusion in *Marks* v. *City of Anchorage*, 500 P.2d 644 (1972): an ordinance that prohibited disorderly conduct undertaken with the purpose of causing someone "inconvenience, annoyance or alarm" was

unconstitutional on its face because it "contain[ed] language that the United States Supreme Court has specifically declared to be impermissibly vague." *Id.* at 646 (citing *Coates*). Many other courts have reached exactly the same conclusion.[3]

But it gets worse. The Rockford ordinance bans not just annoying *behavior*, but annoying *noise* – which means, of course, it bans annoying *speech*. Where an ordinance is "capable of reaching expression sheltered by the First Amendment," this Court has held, the Due Process Clause requires "a greater degree of specificity than in other contexts." *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); see *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967). "[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California*, 361 U.S. 147, 151 (1959). It therefore follows *a fortiori* from *Coates* – which involved annoying behavior – that ordinances prohibiting subjectively annoying noise in the form of speech are constitutionally proscribed. Indeed, numerous courts have struck down variations on Rockford's theme as facially unconstitutional.

For instance, *Nichols* v. *City of Gulfport*, 589 So. 2d 1280 (Miss. 1991), invalidated an ordinance *identical* to Rockford's, prohibiting "unnecessary or unusual noise[]" that "annoys, injures, or endangers the comfort, repose, health, or safety of others." Because the noise ordinance involved speech, the

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[3] See, *e.g.*, *Kramer* v. *Price*, 712 F.2d 174 (5th Cir. 1983) (Wisdom, J.) (relying on *Coates*; statute prohibited conduct that "annoy[s]" or "alarm[s]" someone), vacated, 723 F.2d 1164 (1984) (vacated after statute repealed); *State* v. *Bryan*, 910 P.2d 212 (Kan. 1996) (relying on *Coates*; statute prohibited conduct that "seriously alarms, annoys or harasses" someone); *People* v. *Norman*, 703 P.2d 1261 (Colo. 1985) (statute prohibited conduct that "alarm[s] or seriously annoy[s] another person"); *May* v. *State*, 765 S.W.2d 438 (Tex. Crim. App. 1989) (statute prohibited "annoy[ing]" or "alarm[ing]" someone); *City of Everett* v. *Moore*, 683 P.2d 617 (Wash. App. 1984) (same); *State* v. *Dronso*, 279 N.W.2d 710 (Wis. App. 1979) (same); *Poole* v. *State*, 524 P.2d 286 (Alaska 1974) ("disturb" or "annoy"); *State* v. *Jamgochian*, 279 A.2d 923 (R.I. 1971) (same).

Mississippi Supreme Court gave it "heightened scrutiny." *Id.* at 1283 (citing *Keyishian*, *supra*). And *Coates*, the court held, was controlling: "If beauty is in the eye of the beholder, whether a noise is 'unnecessary,' 'unusual,' or 'annoying' certainly depends upon the ear of the listener." *Id.* at 1284; accord *United Pentecostal Church* v. *Steendam*, 214 N.W.2d 866 (Mich. App. 1974) (striking down ordinance identical to Rockford's).

Similarly, in *People* v. *New York Trap Rock Corp.*, 442 N.E.2d 1222 (N.Y. 1982), the New York Court of Appeals struck down on its face an ordinance that (like Rockford's) prohibited "excessive or unusually loud sound or any sound which either annoys, disturbs, injures, or endangers [anyone's] comfort, repose, health, peace, or safety." Such an ordinance posed the risk that a conviction "could rest solely upon the malice or animosity of a cantankerous neighbor," which the Constitution plainly forbids. *Id.* at 1227 (internal quotation marks omitted). In like manner, the Fourth Circuit has held that a proscription against "unnecessary" noise "is unconstitutionally vague." *Jim Crockett Promotion, Inc.* v. *City of Charlotte*, 706 F.2d 486, 489 (1983). Numerous other cases have struck down noise ordinances similar to Rockford's on vagueness grounds.[4]

2. Just as numerous courts have followed *Coates* in invalidating "annoying" noise ordinances on vagueness grounds, so too have many courts struck down such laws as unconstitutionally overbroad in violation of the First Amendment. This is hardly surprising: as this Court has explained, the two doctrines – void-for-vagueness and overbreadth – are "logically related

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[4] *E.g.*, *Lionhart* v. *Foster*, 100 F. Supp. 2d 383 (E.D. La. 1999) (ordinance prohibited making noise "in a manner likely to disturb, inconvenience, or annoy"); *Dupres* v. *City of Newport*, 978 F. Supp. 429 (D.R.I. 1997) (ordinance prohibited noise that "annoys, disturbs, injures or endangers [anyone's] comfort, repose, peace or safety"); *Dae Woo Kim* v. *City of New York*, 774 F. Supp. 164 (S.D.N.Y. 1991) (same); *Fratiello* v. *Mancuso*, 653 F. Supp. 775 (D.R.I. 1987) (ordinance prohibited "unnecessary noises or sounds" that "are physically annoying"); *Luna* v. *City of Ulysses*, 17 P.3d 940 (Kan. App. 2000) (ordinance prohibited "any unnecessarily loud or excessive noise or sound" that is "physically or mentally annoying or disturbing").

and similar." *Kolender* v. *Lawson*, 461 U.S. 352, 358 n.8 (1983); see also *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

For example, in *Marks* v. *City of Anchorage*, *supra*, the Alaska Supreme Court held that a proscription against disorderly conduct with the purpose of causing someone "inconvenience, annoyance or alarm" was unconstitutionally overbroad because of its "chilling effect" on the exercise of constitutional rights. 500 P.2d at 646-49. Similarly, in *State* v. *Dronso*, 279 N.W.2d 710 (Wis. App. 1979), the court held that a "statute which subjects a telephone caller to criminal sanctions * * * for calling with intent to annoy * * * is overbroad as it may reasonably be interpreted to prohibit free speech which is constitutionally protected." *Id.* at 714. Other decisions finding similar statutes overbroad are legion. See, *e.g.*, *State* v. *Anonymous*, 389 A.2d 1270 (Conn. App.) (prohibition on conduct that "annoys or interferes with another person" is overbroad), cert. denied, 174 Conn. 803 (1978); *Long* v. *State*, 931 S.W.2d 285, 290 n.4 (Tex. Crim. App. 1996) ("The First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed.") (citing *Coates*).[5]

Indeed, even the Illinois Supreme Court – which declined to disturb the decision below upholding petitioner's conviction – has, in a case not involving an abortion protester, invalidated

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[5] See also *Campa* v. *City of Birmingham*, 662 So. 2d 917, 918-19 (Ala. Crim. App. 1993) (ordinance making it illegal to "make * * * any noise which either annoys, disturbs, injures, or endangers the comfort, repose, health, peace or safety of others in the city" is not "narrowly drafted to avoid unnecessarily restricting competing First Amendment freedoms"); *People* v. *Dietze*, 549 N.E.2d 1166, 1168 (N.Y. 1989) ("Casual conversation may well be 'abusive' and intended to 'annoy'; so, too, may be light-hearted banter or the earnest expression of personal opinion or emotion."); *People* v. *Norman*, 703 P.2d 1261, 1266-67 (Colo. 1985) ("the terms 'annoy' and 'alarm,' when given their conventional meanings, [are] so broad that the most innocuous comment about a debatable or unpleasant topic might subject a person to criminal prosecution" for harassing someone); *Dae Woo Kim*, 774 F. Supp. at 170 (ordinance proscribing noise that is "unnecessary" and "annoys" or "disturbs" others is overbroad).

a similar law on overbreadth grounds. See *People* v. *Klick*, 362 N.E.2d 329, 332 (Ill. 1977) (disorderly conduct law proscribing the making of telephone call with an "intent to annoy another") (citing *Coates*). In that case (which Horien called to the Illinois Supreme Court's attention in unsuccessfully seeking leave to appeal), the Illinois Supreme Court criticized the disorderly conduct law for subjecting "callers to the stigmatization of the criminal process at the election of their listeners who might perceive the call as having been made with the intent to annoy." *Ibid.* It also explained that "[t]he legislature cannot abridge one's first amendment freedoms merely to avoid slight annoyances caused to others." *Ibid.* So, too, here.

C. The Illinois Appellate Court's decision in this case is inconsistent with *Coates* and with the other many other cases cited above. The ordinance struck down in *Coates* made it a crime for "three or more persons to assemble" on "any of the sidewalks" within the city "and there conduct themselves in a manner *annoying* to persons passing by." 402 U.S. at 611 & n.1 (emphasis added; internal quotation marks omitted). That ordinance is indistinguishable, in its pertinent language, from the Rockford law at issue here, which proscribes the making of "unnecessary or unusual" noise that "annoys" another person or "endangers" or "injures" another's "comfort" or "repose." If anything, the Rockford law is *broader and more indeterminate* because it covers the creation of "any noise," at "any time," anywhere within the city, so long as it is subjectively annoying to the hearer, whereas the Cincinnati law in *Coates* was limited to conduct occurring on the public sidewalks that was annoying to passersby. Though the Rockford ordinance covers noise rather than conduct, that only strengthens the constitutional objection, as explained above. And, of course, in the case of both ordinances the core criminal proscription against causing subjective "annoyance" to another is utterly lacking in any ascertainable standard for guiding conduct.

D. Completely ignoring petitioner's citation of *Coates*, the appellate court instead relied largely on two fifty-year-old Illinois Supreme Court decisions. App., *infra*, 5a-6a (citing *City*

of Chicago v. *Reuter Bros. Iron Works*, 75 N.E.2d 355 (Ill. 1947), and *Dube* v. *City of Chicago*, 131 N.E.2d 9 (Ill. 1955), cert. denied, 350 U.S. 1013 (1956)). In addition to lacking precedential force in the face of controlling authority from this Court, those decisions are readily distinguishable: both involve the application of narrowly tailored zoning ordinances, and both featured language that is materially different from that of the Rockford misdemeanor anti-noise ordinance. In *Reuter Bros.*, the Illinois Supreme Court rejected a vagueness challenge to a zoning ordinance that authorized "manufacturing," including the activity of "[f]abricating, other than snap riveting or processes used in bending and shaping of metals which *emit noises of a disagreeable or annoying nature*, for assembling metal products, forging of metals, melting, [and] casting of metals * * *." 75 N.E.2d at 357 (emphasis added) (internal quotations marks omitted). Read in context, the court explained, the words "disagreeable or annoying" together convey a "common law meaning" signifying noise that would constitute a nuisance at common law.

The Rockford ordinance, however, contains much broader language. As a general matter, the ordinance applies to any noise occurring anywhere in the City of Rockford, at any time, so long as the noise is "unnecessary or unusual" and it "annoys" another person or "endangers" or "injures" another's "comfort" or "repose." And even if this language were interpreted as describing common law nuisances, that would hardly remove the fatal ambiguity and overbreadth under this Court's decisions. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" W. KEETON ET AL., PROSSER AND KEETON ON TORTS 616 (5th ed. 1984). Thus, the term "nuisance" has "meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition." *Ibid.* (footnotes omitted; emphasis added). The appellate court's decision accordingly does nothing to remove the essential ambiguity or overbreadth of the criminal

proscription; indeed, it compounds it. See also *Saia*, 334 U.S. at 560 (invalidating penal ordinance forbidding the use of sound amplification device even though ordinance was "dressed in the garb of the control of a 'nuisance'"). The sweeping breadth of the Rockford ordinance, moreover, is abundantly clear from the appellate court's holding that petitioner's speech *in this case* qualified as a forbidden "nuisance."

E. Summary reversal is warranted because, under this Court's precedents, the Rockford ordinance is unconstitutionally vague as well as overbroad.[6] Due process, as this Court has made clear, requires that a law be sufficiently clear on its face to enable citizens to order their behavior – and thus a law "fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). Due process also requires that a law be sufficiently clear that it not lead to arbitrary enforcement by allowing "policemen, prosecutors, and juries to pursue their personal predilections." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) (internal quotation marks omitted).

The Rockford "nuisance noises" ordinance is fatally ambiguous. How is someone supposed to know what might be "unnecessary" or "unusual" or "annoying" to someone else, and how is a police officer in any way constrained from arresting someone on a whim or because of disagreement with the speaker's message? Respondent has never disputed in this case

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[6] This Court has not hesitated to order summary reversal of state court decisions that ignored the teachings of *Coates*, *Edwards*, *Cox*, or *Saia*. See, *e.g.*, *Norwell* v. *City of Cincinnati*, 414 U.S. 14 (1973) (per curiam) (reversing decision of intermediate Ohio appellate court that had affirmed conviction under ordinance prohibiting disorderly conduct done "with the intent to * * * annoy any person"); *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964) (per curiam) (reversing decision of South Carolina Supreme Court that ignored *Edwards*); *Fields* v. *South Carolina*, 375 U.S. 44 (1963) (per curiam) (same); see also *Karlan* v. *City of Cincinnati*, 416 U.S. 924 (1974) (per curiam). At a minimum, the Court should vacate the decision below and remand with instructions to consider this Court's decision in *Coates*.

that the question whether noise is "annoying" hinges on a subjective standard and thus rests solely on the sensibilities of the beholder: what might annoy one person might not annoy another, and someone protesting on the public sidewalk would have no way of knowing whether he was breaking the law. Faced with a similar ordinance in *Coates*, this Court explained that the ordinance was "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'" 402 U.S. at 614 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)).

Like the void-for-vagueness doctrine, the First Amendment overbreadth doctrine protects against the dangers of standardless discretion that inhere in statutes regulating the fringes of First Amendment-protected activity. Overbroad restrictions on activity protected by the First Amendment also present concerns of self-censorship. "Where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972); see also *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2196 (2003).

Substantial overbreadth occurs if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (internal quotation marks omitted). Thus, in *Coates*, this Court held that the ban on annoying behavior was "unconstitutionally broad" on its face even though the ordinance could constitutionally be applied to littering or blocking sidewalks. 402 U.S. at 611. A prohibition of "annoying" behavior also contains "an obvious invitation to discriminatory enforcement" against people whose "ideas * * * [are] resented by the majority of their fellow citizens." *Id.* at 616. The same

analysis condemns the Rockford ordinance in this case.

F. This case provides a compelling illustration of the dangers of vague and overbroad criminal provisions – especially those that may be applied to punish core political expression protected by the First Amendment. Petitioner had no way of knowing that the tone and volume of his voice would annoy Mr. Stone (or anyone else); indeed, he had earlier protested in a loud falsetto, apparently without "annoying" anyone. Nor, for that matter, does petitioner have any way of knowing any better *after* his conviction how to go about exercising his right to speak in the quintessential public forum of the sidewalk outside of the Rockford clinic without running afoul of the anti-noise ordinance. He was convicted of speaking in falsetto. Would he annoy someone if he spoke in basso profundo? A foreign accent? A Homer Simpson voice? And what standards would the police apply in deciding how "annoying" is "annoying"? Because the answer to questions like these is anybody's guess, this Court held in *Coates* that irredeemably vague laws that proscribe "annoying" behavior are unconstitutional on their face.

Unfortunately, this case also illustrates the risk of abuse that accompanies such laws. See *Saia*, 334 U.S. at 562 ("Annoyance at ideas can be cloaked in annoyance at sound."). Petitioner was prosecuted and convicted on the strength of a complaint by Robert Stone, a neighbor who lived a block away and claimed to have been "annoyed" by petitioner's voice behind closed windows and over the sound of floor drum sanders blasting away on the floor beneath him. But Stone's story was so ludicrous that the *appellate* court disregarded it as "inherent[ly] implausibl[e]." App., *infra*, 8a. In so doing, moreover, the appellate court pointedly noted that Landerholm, petitioner's fellow protester, "suspected that Stone was annoyed by the protester's message rather than by the volume of [Horien's] voice." *Ibid.* Yet Stone's complaint was the exclusive basis for summoning the police in the first place, not to mention the only predicate for petitioner's citation.

Despite these concocted allegations by Stone, the appellate court saw fit to uphold the conviction based on the testimony of

a *different* witness: Wayne Webster, the building's owner, whose testimony clearly expressed his irritation at having to deal with the repeated protests outside the commercial property he owned. Worse yet, the evidence clearly established that Webster had routinely broadcast the radio from loudspeakers mounted on the building towards the protesters in an effort to drown out their speech – and, indeed, was doing so on the date of the incident in question. (Notably, this too can be a violation of the Rockford anti-noise ordinance, see § 17-8 (App., *infra*, 13a), yet Webster was not cited by the Rockford police.) The appellate court nevertheless relied on Webster's testimony that he was "annoyed" by the loud speech that petitioner was using precisely to overcome Webster's efforts to silence him. That is a novel – and deeply troubling – theory of criminal "annoyance" if ever there was one. See also *Lawrence* v. *Texas*, slip op. 15 (U.S. June 26, 2003) (conviction for a "class C misdemeanor" that is a "minor offense" under state law nevertheless carries a "stigma" that is "not trivial," imposes other collateral consequences, and "remains a criminal offense with all that imports for the dignity of the person charged").

II. The Court Should Clarify Whether A Ban On "Unnecessary" And "Annoying" Speech Is Content Based Or Content Neutral And Whether The Rockford Ordinance, As Applied, Violates The First Amendment

If the Court elects not to reverse summarily, then it should grant review of all three issues presented in this petition. As just explained, the facial challenge to the Rockford ordinance is deserving of review because the rejection of that challenge below conflicts with this Court's decisions and the decisions of many lower courts. That issue is also of surpassing importance and – as shown by the numerous cases cited above – is recurring in nature. Moreover, if the Court grants plenary review of the question relating to petitioner's facial challenges, then it should also grant review of the second and third questions presented. Those questions raise as-applied arguments under the First Amendment that are closely related to the facial challenges; they would allow the Court to consider all the First Amendment

issues at once (and preserve the Court's ability to resolve the case in petitioner's favor on a narrow, as-applied basis); and they implicate several doctrinal issues that are important and would benefit from clarification by the Court.

A. The appellate court held that, although the Rockford ordinance undisputably "places restrictions on expression protected by the first amendment," it is content neutral because it "does not mention any type of speech" and "merely prohibits unnecessary sound that interferes with others' comfort, repose, health, or safety." App., *infra*, 6a-7a. In reaching that conclusion, the court did not discuss the ordinance's exception for "annoying" noise that is "necessary" to protect property or "the health, safety, or life of some person." The lower court also concluded that the ordinance survives the intermediate scrutiny test applicable to "time, place, or manner" restrictions because it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative means of communication. The government has a significant interest in "regulating noise," the court reasoned, and the ordinance is narrowly tailored because it "prohibits only sounds creating a nuisance." *Id.* at 8a. The court rejected petitioner's argument that alternative means were unavailable for communicating his message to his intended audience: the patients and workers who were disappearing behind a "privacy fence" at the clinic. *Ibid.*

B. Whether a restriction on speech is content based or content neutral is often dispositive. Content-based restrictions are subject to strict scrutiny and are presumptively unconstitutional; they survive only if the government shows that they are "necessary to serve a compelling state interest and * * * narrowly drawn to achieve that end." *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). Content-neutral restrictions, in contrast, are subject to laxer, intermediate scrutiny; they are constitutional if they are "narrowly tailored to serve a significant governmental interest, and * * * leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). "The principal inquiry in

determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Thus, "content-neutral speech restrictions [are] those that are *justified* without reference to the content of the regulated speech." *Boos* v. *Barry*, 485 U.S. 312, 320 (1988) (internal quotation marks omitted).

Yet distinguishing between the two is not so easy. Cf. *Hill* v. *Colorado*, 530 U.S. 703 (2000). In *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a city imposed zoning restrictions on adult theaters, but not on other types. Even though adult theaters were singled out, the Court held, the zoning laws were content-neutral: the city ordinance was aimed not at the content of the movies being shown, but at their "secondary effects" (such as increased crime or decreased property values). In *Boos*, the challenged restriction "prohibited the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" 485 U.S. at 315. Relying on *Renton*, the city defended its ordinance on the ground that restricting criticism was also aimed at the secondary effects of the speech – "to shield diplomats from speech that offends their dignity." *Id.* at 320. This Court distinguished *Renton* (*id.* at 321):

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. * * * The emotive impact of speech on its audience is not a secondary effect.

The ordinance outlawing critical speech was, by contrast, justified based on the content (whether the speech was critical), and was therefore subject to "the most exacting scrutiny." *Ibid.*

Similarly, *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123 (1992), involved an ordinance imposing a parade-permit fee that varied depending on the cost of security required for the parade. *Id.* at 126-27. The county argued that the costs imposed on a parade organizer were aimed at secondary effects of the speech – "the cost of maintaining public order." *Id.* at 134. This Court noted that the variance in the cost related to "the amount of hostility likely to be created by the speech based on its content." *Ibid.* Because the restriction on the speech was directly tied to "the public's reaction to the speech," and speech was financially burdened "simply because it might offend a hostile mob," the restriction was content based. *Id.* at 134-36.

Given the indeterminacy of the concept of "annoyance," it should come as no surprise that courts are divided over whether a law making it illegal to "annoy" someone is content based. *Township of Plymouth* v. *Hancock*, 600 N.W.2d 380 (Mich. App. 1999), appeal denied, 618 N.W.2d 585 (Mich. 2000), involved a constitutional challenge to an ordinance making it illegal to "unreasonably annoy or disturb" someone through "vulgar conduct"; the court held that the ordinance was content neutral because it "does not attempt to regulate speech on the basis of its message" (600 N.W.2d at 384 n.3). The Michigan Supreme Court denied leave to appeal, but two justices dissented: "Although, at first blush, the ordinance appears to be a restriction on noise that would be subject to less scrutiny, close examination of the ordinance language reveals that it does address content." 618 N.W.2d at 586.

Moreover, at least two cases have held that noise ordinances functionally indistinguishable from Rockford's are content based. In *Dupres* v. *City of Newport*, 978 F. Supp. 429 (D.R.I. 1997), the court invalidated an ordinance that proscribed the "making, creation or permitting" of "any unreasonably loud, disturbing or unnecessary noise * * * or * * * noise * * * which either steadily or intermittently annoys, disturbs, injures or endangers the comfort, repose, peace or safety of any individual." *Id.* at 431. The ordinance was content based, the court held, because it allowed "law enforcement and others" to

determine "whether the ordinance has been violated on purely subjective, content-based criteria" – that is, whether noise was "annoying" or "unnecessary." *Id.* at 435. Applying strict scrutiny, the court struck down the ordinance on its face.

Similarly, *Fratiello* v. *Mancuso*, 653 F. Supp. 775 (D.R.I. 1987), involved a noise ordinance that made it unlawful

> for any person to make, cause or suffer or permit to be made or caused upon any premises owned * * * by him, or upon any public street * * * unnecessary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons.

Id. at 790. The court held that, by prohibiting "unnecessary noises or sounds * * * which are physically annoying to persons," the ordinance "selectively proscribe[d] a certain category of speech; that which the listener views as 'annoying.' Such a subjective content-based restriction invites suppression of unpopular ideas." *Ibid.* Accordingly, the court held, the ordinance was facially invalid. *Ibid.*[7]

Because the Rockford ordinance is justified by "[l]isteners' reactions to speech" (*Boos*, 485 U.S. at 321) – whether listeners' are "annoyed"– the ordinance is content based and thus subject to strict scrutiny (which it cannot possibly survive, for the same reasons given below for why it cannot satisfy intermediate scrutiny). Two other aspects of the ordinance, as applied in this case, underscore its content-based nature. First, the ordinance contains an exception that hinges on the content of speech. Rockford has exempted annoying speech "necessary for the protection or preservation of property, or the health, safety, or life of some person." In this case, petitioner has consistently argued that his protests at the clinic fell within that exception

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[7] Other courts have ruled that a narrowing construction of an anti-noise provision is necessary to render it content neutral and thus avoid strict scrutiny. See, *e.g.*, *Eanes* v. *State*, 569 A.2d 604, 610 (Md.) (interpreting word "unseemly" in law prohibiting "loud and unseemly noise" as modifying the volume level of "loud" to ensure content neutrality), cert. denied, 496 U.S. 938 (1990).

because he was attempting to save the lives of unborn children. The lower courts rejected that argument, however, on the ground that "some person" did not cover an unborn child. Regardless of what one thinks of petitioner's argument, it is plain that the applicability of this exception turns on the content and meaning of petitioner's speech. Second, in this case the Illinois courts upheld petitioner's conviction in part because he used a falsetto – a feature of his protests that cannot be separated from his actual message (any more than a foreign accent could be separated, for example, from a satirical speech on American immigration policy). In these circumstances, the ordinance as applied to petitioner was content based.

C. Even if the Rockford ordinance is properly analyzed as a content-neutral "time, place, or manner" restriction, the question remains whether it both is narrowly tailored to serve a significant governmental interest and leaves open ample alternative means of communication. The appellate court concluded that the Rockford ordinance passed this test, but that conclusion was mistaken and inconsistent with this Court's decisions.

1. The Rockford ordinance contains no limitation at all as to "time" and no limitation as to place (beyond requiring that the noise occur in Rockford). Nevertheless, the lower court held that the ordinance was a reasonable "time, place, or manner" restriction, presumably because it functioned as a "manner" restriction limiting speech and other noises to those that were not "annoying," and was narrowly tailored.

This Court's decisions make clear, however, that *far greater precision* is required for municipal anti-noise ordinances to satisfy the narrow tailoring requirement. For example, in *Saia* v. *New York*, this Court struck down as "not narrowly drawn" a law that failed to "regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted," and that contained no such discernible standards and was "dressed in the garb of the control of a 'nuisance.'" 334 U.S. at 560. "Any abuses which loud-speakers can create," this Court explained, "can be controlled by narrowly drawn statutes." *Id.* at 562.

Similarly, in *Kovacs* v. *Cooper*, 336 U.S. 77, 83 (1949), a plurality of the Court, in upholding a ban on sound trucks, noted that the ordinance applied only to (a) vehicles, (b) operated on the public streets, (c) containing sound amplifiers or other instruments "emitting loud and raucous noises." The plurality observed that absolute prohibition on sound trucks would be "probably unconstitutional." *Id.* at 82, 85. Significantly, the plurality noted that the ordinance did not place restrictions on "the communication of ideas or discussion of issues *by the human voice*." *Id.* at 89. Concurring, Justice Frankfurter underscored this distinction, explaining that "[o]nly a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice." *Id.* at 96; accord *id.* at 97 (Jackson, J., concurring).

Finally, in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), the Court upheld against Due Process and First Amendment challenges a much narrower Rockford anti-noise ordinance prohibiting the willful making of a "noise or diversion" (a) on property directly adjacent to a school, (b) during school hours, if the noise (c) "disturbs or tends to disturb" the school session. See note 1, *supra*. In reaching that result, this Court relied on a narrowing construction that had been adopted by the Illinois courts (see *ibid.*), and it emphasized that, in contrast to the ordinance at issue in *Coates*, which embodied a "completely subjective standard of 'annoyance[],'" Rockford's school disruption ordinance "prohibited disturbances" that were "easily measured by their impact on the normal activities of the school." 408 U.S. at 112. Even then, the Court reasoned, the constitutional question in *Grayned* was "close." *Id.* at 109.

Judged by the same standards, the Rockford "nuisance noises" ordinance is *not* narrowly tailored. Indeed, it is far broader than the ordinance struck down in *Saia*, which was limited to the use of loudspeakers. And it features far less tailoring than the other provisions included in Rockford's anti-noise ordinances, many of which include precise decibel limitations, precise distance limitations, or precise time restrictions. See

App., *infra*, 11a-15a.[8]

Nor, as applied to petitioner's conduct, does the Rockford ordinance leave open ample alternative means of communication. See, *e.g.*, *Bay Area Peace Navy* v. *United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (invalidating 75-yard restriction on water-borne demonstrations aimed at audience of invited officials watching naval display from pier, despite possibility that demonstrators could pass out leaflets or demonstrate on land; explaining that "an alternative is not ample if the speaker is not permitted to reach the intended audience"); *Weinberg* v. *City of Chicago*, 310 F.3d 1029, 1041-42 (7th Cir. 2002) (restriction on selling book critical of Chicago Blackhawks hockey team within 1,000 feet of stadium where they played did not leave open ample alternative channels for speech, even though author remained free to sell book in other areas of city, through bookstores, or on the Internet), petition for cert. pending, No. 02-1710. In fact, the Rockford ordinance has the effect of preventing petitioner from effectively reaching his intended audience through the spoken word – or perhaps at all. See *Gilleo* v. *City of Ladue*, 512 U.S. 43, 45, 54-58 (1994) (invalidating ordinance that effectively eliminated entire mode of expression – protest from one's own doorstep – by barring homeowner's display of signs except for "residence

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[8] In enacting the Quiet Communities Act of 1978, Pub. L. 95-609, 92 Stat. 2079, Congress directed the Environmental Protection Agency (EPA), among other things, to "provide technical assistance to State and local governments" by preparing "model State or local legislation for noise control." 42 U.S.C. § 4913(f). In addition to a variety of highly specific provisions targeting various kinds of noises, EPA's Model Community Noise Control Ordinance includes a general proscription against the "*unreasonabl[e]*" making of "noise disturbances," a term elsewhere defined to include sounds that "annoy[] or disturb *a reasonable person* of *normal sensibilities*." Model Ordinance §§ 3.2.20, 6.1 (emphasis added) (*available at* http://www.nonoise.org/library/epamodel/epamodel.pdf). The Model Ordinance, moreover, expressly *exempts* political protest activities on public sidewalks from this general proscription against "noise disturbances." See *id.* § 6.1 ("Non-commercial public speaking and public assembly activities conducted on any public space or right-of-way shall be exempt from the operation of this Section.").

identification" and "for sale" signs and signs warning of safety hazards). It is no answer to say, as the lower court did, that petitioner remains free to stop chanting and to offer a pamphlet to those driving by and entering the parking lot in cars with the windows rolled up. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988).

2. Although the decision below is unpublished, it does not stand entirely alone. In recent years, two state supreme courts have issued narrowly divided decisions that similarly upheld criminal convictions, under local noise ordinances, of political protesters who did nothing more than use their unamplified voices to express their political views. As those cases demonstrate, there is a need for this Court to reaffirm the stringent constitutional limits on the power of government to impose criminal penalties in this situation.

Until recently, courts faced with such convictions have – like this Court in *Coates* – invalidated the underlying ordinances on vagueness or overbreadth grounds. Alternatively, they have provided sharply limiting constructions that avoided the First Amendment problems. Several state supreme courts, for example, have interpreted disturbing-the-peace or anti-noise laws, if applied to the "noise" created by political protesters, as requiring a showing that "there is a clear and present danger of violence or * * * the communication is not intended as such but is merely a guise to disturb persons." *In re Brown*, 510 P.2d 1017 (Cal. 1973) (indicating that this gloss was required to avoid First Amendment problems), cert. denied, 416 U.S. 950 (1974); see also *People* v. *Fitzgerald*, 573 P.2d 100, 104 (Colo. 1978) (same); *State* v. *Marker*, 536 P.2d 1273 (Or. Ct. App. 1975) (same) (citing additional cases).

More recently, however, the Maryland Court of Appeals upheld the conviction of a protester engaged in core First Amendment speech for "wilfully disturbing a[] neighborhood by loud and unseemly noises." *Eanes* v. *State*, 569 A.2d 604 (Md.), cert. denied, 496 U.S. 938 (1990). Late one morning,

Jerry Eanes stood on a public sidewalk in Hagerstown in front of an abortion clinic and in order to discourage abortion "preach[ed] the gospel of Jesus Christ" in a "very or extremely loud voice," "yelling and screaming at the top of his voice." *Id.* at 606, 607. A sharply divided court affirmed his conviction after construing the statute as prohibiting only "unreasonably" loud noise, and as requiring a prior warning by the police. *Id.* at 610, 617. So construed, the majority held, the statute "afford[ed] content-neutral protection to the captive auditor * * * who cannot avoid continuing, unreasonably loud and disruptive communications emanating from the street." *Id.* at 612.

Three of the seven members of the court dissented. As Judge Eldridge wrote for the dissenters, "apparently for the first time ever" a "state's highest court has upheld a criminal conviction based solely on the loudness of a single individual in delivering constitutionally protected speech with an unamplified human voice, in a permitted place and at a permitted time." 569 A.2d at 620. The defendant, the dissenters explained, had been "engaged in free speech in its 'most pristine and classic form'" (*id.* at 622 (quoting *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963)), expressing his views on "one of the most controversial political and social issues today." *Ibid.*

Even if the statute were content-neutral, the dissenters argued, it was not narrowly tailored to serve a significant government interest, and did not leave open ample alternative means of communication. Invoking the lessons of the civil rights protests of the 1960s, the dissenters also pointed to the dangers in application of the statute. A statute preventing even "unreasonable" sound could, even if "[t]heoretically" content neutral, be applied to suppress speech on the basis of its content: complainants and police would have "a powerful weapon which can easily be misused to suppress speech because of its content and because of the identity of the speaker." 569 A.2d at 624.

More recently, the South Carolina Supreme Court, by a 3-2 vote, similarly upheld a conviction of various street preachers for making "loud and unseemly noises" in delivering religious speeches on the main street of Beaufort, South Carolina.

Beaufort v. *Baker*, 432 S.E.2d 470 (S.C. 1993); see also *Asquith* v. *City of Beaufort*, 139 F.3d 408, 411 (4th Cir. 1998) (in reversing preliminary injunction entered against enforcement of same Beaufort noise ordinance, noting that ordinance was "copied from" the Maryland law at issue in *Eanes*). The majority relied largely on the Maryland Court of Appeals' decision in *Eanes*. The dissenters, in turn, took the majority to task for ignoring this Court's decisions. See *id.* at 477 (arguing that it was "astounding that an unamplified, non-threatening voice, at noon, on a public street in a commercial district, is speech which can be restricted").

Eanes and *Baker* have spawned considerable academic commentary, most of it highly critical. See, *e.g.*, Flynn, *Street Preachers v. Street Merchants: Will the First Amendment Be Held Captive in the Balance?*, 14 ST. LOUIS U. PUB. L. REV. 613 (1995); Sullivan, *Court Finds No First Amendment Conflict in Ban on "Loud and Unseemly" Speech*, 46 S.C. L. REV. 22 (1994); Note, 20 U. BALT. L. REV. 507, 517 (1991) (criticizing *Eanes* as "a threat to free speech"); compare Harvey, *Street Preaching v. Privacy: A Question of Noise*, 14 ST. LOUIS U. PUB. L. REV. 593 (1995) (defending decisions). As Professor Flynn has explained, "[s]treet preaching is an American tradition" that "pre-dates the Revolution" and "has always involved 'loud' speaking." 14 ST. LOUIS U. PUB. L. REV. at 615; see also *id.* at 615 & n.5 (noting that James Madison's belief in need for a First Amendment may have been informed by contemporaneous efforts by local governments to use "disturbing the peace" laws to curb loud itinerant preachers). "For most of our history, the free speech interests of street preachers have prevailed over audience complaints" and arguments based on the asserted need to protect a "captive audience." *Id.* at 641. As these decisions and academic commentary demonstrate, this important area of law would benefit from further clarification by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision summarily reversed; in the alternative, the petition should be granted and the case set for briefing and argument.

Respectfully submitted,

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

ALAN UNTEREINER*
ARNON D. SIEGEL
MAX HUFFMAN
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

JULY 2003

APPENDICES

APPENDIX A

[Stamped: "This Order Is Not Precedential And Is Not To Be Cited"]

[Filed stamp: Dec 20 2002] [court clerk's name omitted]

No. 2–02–0295

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE CITY OF ROCKFORD, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Winnebago County
v.	)	No. 01-OV-840
ADRIEN D. HORIEN, Defendant-Appellant.	)	Honorable Brian Dean Shore, Judge, Presiding.

RULE 23 ORDER

Following a bench trial, defendant, Adrian D. Horien, was found guilty of violating the "nuisance noises" ordinance of the City of Rockford, and he was fined $100. Defendant, who proceeds *pro se*, admits that his conduct was intended to deter patients and workers from entering the Northern Illinois Women's Center, a facility that performs abortions. Defendant appeals the judgment, arguing that the ordinance is unconstitutional because it is vague and restricts free speech. He also challenges the sufficiency of the evidence. We affirm.

FACTS

The noise ordinance at issue provides that "[i]t shall be unlawful to cause or create any unnecessary or unusual noise at any time which annoys, injures, or endangers the comfort,

repose, health, or safety of others, unless such noise is necessary for the protection or preservation of property, or the health, safety, or life of some person." Chapter 17, Section 17–10(a), City of Rockford Code of Ordinances. The complaint alleged that defendant "stood on a public way yelling and screaming at patients of the Northern Illinois Women Center annoying and disturbing the comfort of Robert Stone."

At trial, Stone testified that, before 8:00 a.m. on June 8, 2001, he was upstairs in his home while workers were using rotary wood floor sanders downstairs. Even though the sanders were very loud, Stone heard a person shouting very loudly from the abortion clinic that was one block from Stone's residence. Stone did not understand what words were being shouted, but the repeated shouting was very annoying. His attempt to block the noise by shutting his window was unsuccessful. After approximately 20 minutes, Stone decided to ask the person to stop yelling.

When he arrived at the abortion clinic, Stone discovered a few people protesting on the sidewalk, but defendant was yelling louder and more frequently than the others. Stone did not ask defendant to stop protesting or to leave the area. Stone merely asked defendant to stop yelling, and when defendant refused, Stone contacted the police. At trial, Stone insisted that his political beliefs on abortion did not affect his decision to report defendant's conduct.

Officer Michael McDonald testified that he responded to the noise complaint and went with Stone to the clinic. Stone identified defendant, who admitted to McDonald that his voice was loud and that he was not shouting to protect any property. McDonald issued defendant a citation for violating the noise ordinance.

Wayne Webster, the owner of the building, testified that, on the morning of the incident, he was on the second floor of the building with the windows closed when he heard shouting from

outside. Defendant was standing on the sidewalk and "screaming in a loud falsetto voice." None of the other protestors was nearly as loud as defendant. Webster was accustomed to protests outside the building, but defendant's falsetto screaming was unusually loud and obnoxious. The building's security cameras recorded the incident, and the City introduced the video at trial. The cameras, which were located inside the building behind closed windows, recorded sounds but did not amplify them. Webster identified a particular portion of the video in which defendant repeatedly shouted "mommy, daddy, don't kill me" toward people walking from the parking lot to the clinic.

William Landerholm testified that he protested on the sidewalk with defendant on the day of the incident. Landerholm testified that he and defendant took turns "lifting up [their] voices" to discourage the workers and patients from entering the facility. The protesters also used literature, graphic signs, and street theater to convey their message. When Stone complained about the noise, defendant explained that he and Landerholm needed to raise their voices because music was playing in the parking lot to drown out the protesters. Landerholm believed that Stone complained only because he disliked the protesters' message.

Defendant testified that he frequently protested outside the clinic. While shouting "mommy, please don't kill me," defendant used a falsetto voice to imitate a baby. He admitted that other methods were available for conveying his message. No one asked defendant to stop protesting; Stone and Webster merely asked him to lower his voice.

The trial court found defendant guilty by a preponderance of the evidence after reviewing the video and crediting the testimony of Stone and Webster. The court noted that (1) only the volume of defendant's protest was restrained, (2) he had other means of conveying his message, and (3) the combination of loud volume and whiny repetitiveness made defendant's

shouting annoying. The trial court imposed a $100 fine, and defendant filed a motion for a new trial. The court denied the motion, and this timely appeal followed.

ANALYSIS

On appeal, defendant argues that (1) the noise ordinance is unconstitutionally vague because it does not specify a maximum permitted decibel level, (2) his first amendment right to free speech trumps the public's right to be free from annoying noise, and (3) even if the ordinance is constitutional, the City did not prove a violation.

Municipal ordinances are presumed constitutional. *Van Harken v. City of Chicago*, 305 Ill. App. 3d 972, 976 (1999), citing *City of Chicago Heights v. Public Service Co. of Northern Illinois*, 408 Ill. 604, 609 (1951). The appellate court employs a *de novo* standard of review in examining the constitutionality of an ordinance. *People v. Malchow*, 193 Ill. 2d 413, 418 (2000).

Defendant initially contends that the ordinance is unconstitutionally vague because it does not specify a maximum permitted decibel level. Due process is violated if a law is so vague and devoid of standards that it leaves the public unsure of what is and what is not prohibited or if it lacks adequate guidelines for the administrative body that must enforce it. *City of Aurora v. Navar*, 210 Ill. App. 3d 126, 132 (1991). The language of an ordinance must convey sufficiently definite warning of what conduct is prescribed, and the adequacy of such notice is measured by common understanding and practices. *Navar*, 210 Ill. App. 3d at 133.

In *Navar*, the defendant was prosecuted under an ordinance prohibiting commercial activity which was "audible" from "adjacent premises" after 9 p.m. This court concluded that the city intended only to proscribe sound which created a nuisance. However, the plain language of the ordinance punished both annoying sounds and those which did not create a nuisance.

Therefore, we held that the ordinance was unconstitutionally vague because it did not warn the public or the enforcement authorities of what conduct was prohibited. *Navar*, 210 Ill. App. 3d at 134. The noise ordinance in this case prohibits only unnecessary or unusual noise that "annoys, injures, or endangers the comfort, repose, health, or safety of others." An "unnecessary" or "unusual" noise is one that is not required to alert others of an emergency. Therefore, the ordinance in this case is distinguishable from the one in *Navar*.

Our supreme court has held that an ordinance restricting noise of a "disagreeable or annoying nature" was not unconstitutionally vague. *City of Chicago v. Reuter Brothers Iron Works, Inc.*, 398 Ill. 202, 206 (1947). The court noted that the words "disagreeable" and "annoying" had a well-established meaning in the context of common-law nuisance that set forth the duty of those to be regulated. *Reuter*, 398 Ill. at 206-07. The supreme court later reaffirmed *Reuter* in finding constitutional an ordinance that prohibited conduct "disturbing the peace and comfort of occupants of adjacent premises." *Dube v. City of Chicago*, 7 Ill. 2d 313, 324 (1955). The appellate court similarly rejected a vagueness challenge to an ordinance prohibiting "loud and raucous sounds." *Town of Normal v. Stelzel*, 109 Ill. App. 3d 836, 840 (1982).

Like the ordinance in this case, the ordinances in *Reuter*, *Dube*, and *Stelzel* did not set a maximum volume level and instead generally prohibited sounds that constituted a nuisance. Therefore, in agreement with those cases, we hold that the plain language of the noise ordinance gives fair notice to the public and to the City that noise creating a nuisance is prohibited. We conclude that the ordinance is not unconstitutionally vague.

We next address defendant's argument that the noise ordinance restricts his right to free speech. The first amendment to the United States Constitution, which applies to the states through the due process clause of the fourteenth amendment, prohibits governmental action that denies or abridges freedom

of speech. U.S. Const., amends. I, XIV. There is no dispute that Rockford's noise ordinance places restrictions on expression protected by the first amendment. The ordinance restricts an individual's right to audible expression in a public forum by limiting the volume of that expression.

Nevertheless, it is well established that the government may, "'within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.'" *People v. Jones*, 188 Ill. 2d 352, 356 (1999), quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 129 L. Ed. 2d 36, 43, 114 S. Ct. 2038, 2041 (1994). The first amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. A state may therefore impose reasonable restrictions on the time, place or manner of constitutionally protected speech occurring in a public forum. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 675, 109 S. Ct. 2746, 2753 (1989). A valid "time, place, and manner" regulation, however, must be content-neutral.

A regulation is content-neutral if it is "'justified without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791, 105 L. Ed. 2d at 675, 109 S. Ct. at 2753, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 227, 104 S. Ct. 3065, 3069 (1984). Generally, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are content-neutral. *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 643, 129 L. Ed. 2d 497, 518, 114 S. Ct. 2445, 2459 (1994). For instance, an ordinance prohibiting the posting of signs on public property was held to be content-neutral because it applied to all signs and was silent concerning any speaker's point of view. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 80 L. Ed. 2d 772, 786-87, 104 S. Ct. 2118, 2128 (1984).

In *Jones*, our supreme court recently examined the constitutionality of a statute that prohibited a driver from

operating a vehicle's sound amplification system so that it could be heard at least 75 feet away. The court held that the statute was not content-neutral because it expressly exempted vehicles engaged in advertising, a certain type of speech. *Jones*, 188 Ill. 2d at 360-61. *Jones* is consistent with the Supreme Court's holding that "a prohibition against the use of sound trucks emitting 'loud and raucous' noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428, 123 L. Ed. 2d 99, 116, 113 S. Ct. 1505, 1517, quoting *Kovacs v. Cooper*, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949). The noise ordinance in this case does not mention any type of speech; it merely prohibits unnecessary sound that interferes with others' comfort, repose, health, or safety. Therefore, we conclude that the ordinance is content-neutral.

A content-neutral time, place, and manner regulation is subjected to an "intermediate level of scrutiny." *Turner*, 512 U.S. at 662, 129 L. Ed. 2d at 530, 114 S. Ct. at 2469. To pass constitutional muster, such regulations must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for communication of the information. *Ward*, 491 U.S. at 791, 105 L. Ed. 2d at 675, 109 S. Ct. at 2753; *Community for Creative Non-Violence*, 468 U.S. at 293, 82 L. Ed. 2d at 227, 104 S. Ct. at 3069.

Defendant admitted at trial that he had alternative means of conveying his anti-abortion message to workers and patients entering the clinic. On the day of the incident, he and the other protesters distributed literature and displayed signs to emphasize their point. Defendant argues that his shouting was necessary "for those few moments" when a worker or patient passed behind a privacy fence in the parking lot before entering the building. Notwithstanding the privacy fence, we conclude that defendant had adequate alternative methods for communicating his message because the people arriving at the clinic walked or drove past the protesters before entering the parking lot. We

further conclude that, because the ordinance prohibits only sounds creating a nuisance, the ordinance was narrowly tailored to serve the significant government interest of regulating noise. Therefore, we reject defendant's argument that the ordinance unconstitutionally restricts his freedom of speech.

Finally, defendant challenges the sufficiency of the evidence. The enforcement of an ordinance is quasi-criminal, but it is tried and reviewed as a civil proceeding. *Village of Kildeer v. LaRocco*, 237 Ill. App. 3d 208, 211 (1992). A city has the burden of proving a violation of an ordinance by a clear preponderance of the evidence. *City of Peoria v. Heim*, 229 Ill. App. 3d 1016, 1017 (1992). On review, a trial court's factual determinations regarding an ordinance violation will not be reversed unless they are contrary to the manifest weight of the evidence. *County of Kankakee v. Anthony*, 304 Ill. App. 3d 1040, 1048 (1999).

In this case, Stone asserted that he was annoyed by defendant who was shouting approximately one block away. However, the defendant was shouting toward the clinic parking lot rather than toward Stone's home, and loud rotary sanders were operating one floor below Stone at the time. Moreover, Landerholm suspected that Stone was annoyed by the protesters' message rather than by the volume of defendant's voice. The trial court credited Stone's testimony despite its inherent implausibility. However, we conclude that a reversal is not necessary because the City presented additional substantial evidence that supports a finding of guilt. *Cf.*, *People v. Lewis*, 165 Ill. 2d 305, 356 (1995) (a single witness's identification of the accused is sufficient to convict if the witness viewed the accused under circumstances permitting a positive identification).

Webster testified that defendant shouted in a "falsetto voice" toward people entering the clinic, and defendant admitted that his voice was "quite loud." The videotape recording of the protest reveals that defendant repeatedly shouted "mommy,

daddy, please don't kill me," in a loud, clear, and shrill voice that could be heard inside the building. Webster testified that the security cameras did not amplify the sounds and that one of the cameras was approximately 100 feet from defendant. The videotape also shows the parties talking, presumably in a normal tone and volume, but these conversations are nearly inaudible. These facts establish that defendant's shouting was an unusually loud and disruptive nuisance, and it is undisputed that no emergency existed at the time. Therefore, we conclude that the trial court's finding of guilt is not against the manifest weight of the evidence. See *Anthony*, 304 Ill. App. 3d at 1048.

For the preceding reasons, the judgment of the circuit court of Winnebago County is affirmed.

Affirmed.

BYRNE, J., with GROMETER AND KAPALA, JJ., concurring.

APPENDIX B

SUPREME COURT OF ILLINOIS

95600 **CLERK OF THE COURT**
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

April 2, 2003

Ms. Deborah M. Fischer
Attorney at Law
30 Amber Court
Lindenhurst, IL 60046

No. 95600 - The City of Rockford, respondent, v. Adrian D. Horien, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 24, 2003.

APPENDIX C

Code of Ordinances, City of Rockford, Illinois (2002):

Chapter 17 NOISE

Sec. 17-1. Findings.

It is recognized that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the quality of our environment.

(Ord. No. 1974-67-0, 4-15-75)

* * *

Sec. 17-3. Vehicular noise generally.

(a) No person shall sound any horn or audible signal device of any motor vehicle of any kind while not in motion, nor shall such horn or signal be sounded under any circumstances except as required by law, nor shall it be sounded for any unnecessary or unreasonable period of time.

(b) A person shall not operate a motor vehicle which is equipped with a muffler or exhaust system or sound muffling device which has been altered or changed to allow noise in violation of these regulations.

* * *

(d) No person shall operate, sell, or offer for sale any motor vehicle subject to registration that will, at any time or under any condition of grade, load, acceleration or deceleration, operate in such a manner as to exceed the following noise limit based on a distance of not less than fifty (50) feet from a center line of travel for the category of motor vehicle indicated:

> Any motor vehicle with a manufacturers GVW rating of 8,000 pounds or more, and any combination of vehicles

towed by such motor vehicle:

35 MPH or less . . . 86dB (A)

Over 35 MPH . . . 90dB (A)

* * *

Sec. 17-3.1. Sound-amplification systems.

(a) *Restriction.* No driver or person in control of any motor vehicle within the city shall operate or permit operation of any sound-amplification system which can be heard outside the vehicle from seventy-five (75) or more feet when the vehicle is being operated or parked upon a highway, unless such system is being operated to request assistance or warn of a hazardous situation.

(b) *Application to emergency vehicles.* This section does not apply to authorized emergency vehicles.

* * *

Sec. 17-4. Boats.

No person shall operate any engine powered watercraft within the City of Rockford in such a manner as to exceed the following noise limit as measured at a distance of not less than fifty (50) feet from the path of travel:

Before January 1, 1975 . . . 85dB (A)

After January 1, 1975 . . . 76 dB (A)

* * *

Sec. 17-6. Construction noise.

It shall be unlawful for any person to use any hammer or power-operated tool for repair or construction purposes between the hours of 10:00 p.m. and 7:00 a.m. within six hundred (600) feet of any building used for residential or hospital purposes. Repairs to public services utilities shall be exempted from this

section.

(Ord. No. 1974-67-0, 4-15-74)

Sec. 17-7. Ground maintenance equipment.

It shall be unlawful to operate any power-driven lawn or garden equipment between the hours of 10:00 p.m. and 7:00 a.m. or any snow blower between the hours of 10:00 p.m. and 5:30 a.m. within six hundred (600) feet of any building used for residential or hospital purposes.

(Ord. No. 1974-67-0, 4-15-74; Ord. No. 1990-294-0, 10-1-90)

Sec. 17-8. Miscellaneous noise sources.

It shall be unlawful to operate the following equipment between the hours of 10:00 p.m. and 7:00 a.m. outdoors within six hundred (600) feet of any building used for residential or hospital purposes if such equipment is audible from any adjacent property used for residential or hospital purposes:

(1) Power-operated models including automobiles, boats and aircraft.

(2) Sound trucks or public address systems.

(3) Musical instruments.

(4) Radios, television sets and phonographs.

(5) Factory time whistles.

(6) Church bells and carillons.

It shall also be unlawful to conduct garbage, yard waste or recycling collection between the hours of 10:00 p.m. and 6:00 a.m. anywhere within the limits of the city.

It shall be unlawful to play music outside at any time using an intercom system on any property abutting or across the street from property zoned and used for residential purposes, if such music is audible more than ten (10) feet from the property from

which the music is operating and it shall be unlawful to play music outside using an intercom system between the hours of 11:00 p.m. and 7:00 a.m. on any property which is abutting or across the street from property zoned and used for residential purposes.

* * *

Sec. 17-10. Nuisance noises.

(a) It shall be unlawful to cause or create any unnecessary or unusual noise at any time which annoys, injures, or endangers the comfort, repose, health or safety of others unless such noise is necessary for the protection or preservation of property or of the health, safety, or life of some person.

(b) No person owning or in possession or control of any building or premises shall use the same, permit the use of the same, or rent the same to be used for any business or employment or residential use, or for any purpose of pleasure or recreation, if such use shall, by its boisterous nature, disturb or destroy the peace of the neighborhood in which such building or premises is situated, or be dangerous or detrimental to health.

(Ord. No. 1974-67-0, 4-15-74)

* * *

Sec. 17-11. Exceptions to regulations.

The following are exempt from the above regulations:

(a) Sirens and bells on emergency vehicles.

(b) Fire and burglar alarms.

(c) Civil defense warning systems.

(d) Train whistles and horns.

(e) Authorized firework displays.

(f) Authorized concerts and parades.

Sec. 17-12. Penalties.

Any person found guilty of violating, disobeying, omitting, neglecting, or refusing to comply with, or resisting or opposing the enforcement of any of the provisions of these regulations, upon conviction thereof, shall be punished by a fine of not less than fifteen dollars ($15.00) nor more than three hundred dollars ($300.00) for the first offense, and not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) for the second and each subsequent offense, in any one hundred eighty-day period, or shall be punishable as a misdemeanor by incarceration for a term not to exceed six (6) months under the procedure set forth in Section 1-2-1.1 of the Illinois Municipal Code, or by both fine and imprisonment. A separate and distinct offense shall be regarded as committed each day on which such person shall continue or permit any such violation, or failure to comply as permitted to exist after notification thereof.

(Ord. No. 1974-67-0, 4-15-74)

Supreme Court, U.S.
FILED
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No. 03-18

IN THE

Supreme Court of the United States

ADRIAN D. HORIEN,

Petitioner,

v.

CITY OF ROCKFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF IN OPPOSITION

KATHLEEN ELLIOTT*
City Attorney
RONALD N. SCHULTZ
Legal Director
CITY OF ROCKFORD
DEPARTMENT OF LAW
425 E. State Street
Rockford, IL 61104
(815) 987-5540

* *Counsel of Record*

Attorneys for Respondent

182152

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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REASONS FOR DENYING THE WRIT

This case does not meet the standard stated in Supreme Court Rule 10 for granting a petition for writ of certiorari only for compelling reasons.

This court has upheld a similar ordinance regarding noise as not void for vagueness. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

The state trial court and appellate court in this case decided this case consistently with the decisions of this court. The appellate court analyzed the city's nuisance noise ordinance under the standards set forth by this court, and determined that the ordinance is content neutral and is a reasonable restriction on the time, place and manner of constitutionally protected speech. The appellate court correctly held that when reviewing the ordinance from an intermediate level of scrutiny, it was narrowly tailored to serve a significant governmental interest and left open ample alternative channels for communication of the information.

Petitioner has completely ignored the holdings of this Court recognizing that a person's free speech rights do not include the right to be "so intrusive that the unwilling audience cannot avoid it" *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

This Court has held that the government has a substantial interest in protecting its citizens from unwelcome noise. This Court has upheld noise and other restrictions affecting protected speech at abortion clinics. This Court has also upheld people's right to be free from unwelcome speech in the privacy of their homes and at their places of business.

The doctrine of overbreadth is an exception to the normal rule regarding standards for facial challenges. The Rockford ordinance is not subject to the overbreadth doctrine because it does not punish a substantial amount of protected free speech.

I. The Lower Court's Ruling That The Rockford Ordinance Is Not Unconstitutionally Vague Is Consistent With Decisions Of This Court

Petitioner incorrectly asserts that the decision in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) holding a Cincinnati ordinance unconstitutionally vague is binding on this case. The ordinance in *Coates* was a disorderly conduct case prohibiting assembly and conduct in a manner annoying to persons passing by. 402 U.S. at 611.

The Rockford "nuisance noise" ordinance specifies that the prohibited conduct is causing or creating any unnecessary or usual noise, and that the noise annoys, injures, or endangers the comfort, repose, health or safety of others. The ordinance permits noise that is necessary for the protection or preservation of property or of the health, safety or life or some person. Sec. 17-10, City of Rockford Code of Ordinances. Pet., App. C at 14a.

The case that is more comparable to the Rockford ordinance is *Kovacs v. Cooper*, 336 U.S. 77 (1949). In *Kovacs* this Court held that the city of Trenton's ordinance prohibiting the use of sound trucks on city streets and prohibiting the use of any instrument attached to and upon a vehicle which emits loud and raucous noises complied with First Amendment requirements of definiteness and clarity. 336 U.S. at 80. This Court in *Kovacs* held that while the

words "loud and raucous" in the ordinance are abstract words, through daily use they acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden. 336 U.S. at 79.

The Rockford ordinance is more specific than the Trenton ordinance because in addition to addressing the volume of the noise, it also requires that the noise annoys, injures, or endangers the comfort, repose, health or safety of others. The appellate court in this case correctly held that the word 'annoying' had a well-established meaning in the context of common-law nuisance, and that the Rockford ordinance likewise generally prohibited sounds that constituted a nuisance and was therefore not unconstitutionally vague. Pet., App. A at 5a.

II. The Lower Court's Ruling That The Rockford Ordinance Is A Valid Time, Place And Manner Restriction On Free Speech Is Consistent With Decisions Of This Court

A. The Rockford Ordinance Is Content Neutral

As the facts of this case show[1], the "nuisance noise" ordinance of the city is designed to ensure that its citizens are not disturbed in their homes and places of business. This Court has recognized governmental authority to make such regulations.

---

1. The complainant in this nuisance noise ordinance violation was a resident who lived at the opposite end of the block from the Respondent's location at the Northern Illinois Women's Center. 12/12/01 Tr. 18. The building owner of the Center also testified concerning the nuisance noise created by the Respondent. 12/12/01 Tr. 24-29. The building owner lives there. 12/12/01 Tr. 31.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court upheld the New York City's guidelines for use of a public bandshell, including a requirement that performers use sound amplification equipment and a sound technician supplied by the city. *Ward* found the New York regulation to be a content neutral regulation that served purposes unrelated to the content of the expression, even though it had an incidental effect on some speakers or messages but not others. 491 U.S. at 791-792.

The Rockford ordinance is clearly a content neutral time, place and manner regulation under the standard of review discussed in *Hill v. Colorado*, 530 U.S. 703 at 719-720 (2000). The ordinance was not adopted because of a disagreement with the message conveyed. The ordinance applies to all nuisance noise, regardless of whether it is even speech or other types of noise, much less the content of the speech. The city's interest in protecting the privacy of unwilling listeners and allowing people the quiet enjoyment of their homes and businesses is not related to the content of the speech. The Rockford ordinance refers to noise, not speech.

B. The Rockford Ordinance Is Narrowly Tailored To Serve A Significant Government Interest

This Court has also held that municipalities are entitled to use their police powers to regulate noise. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protects the well-being and tranquility of a community. [FN4] A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." *Kovacs*, 336 U.S. at 83. In upholding the Trenton sound truck ordinance

in *Kovacs*, this Court stated "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. [FN12] In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality." 336 U.S. at 86, 87. In this case there were unwilling listeners both at the abortion clinic and at home. 12/12/01 Tr. 7-8, 11, 24-26. The city is clearly entitled to protect these citizens from noise that interferes with their right to be let alone.

This "right to be let alone" was acknowledged by this Court in *Hill v. Colorado*, 530 U.S. 703 (2000) as an interest to be balanced against free speech rights in situations involving unwilling listeners. *Hill* upheld a Colorado criminal statute prohibiting any person from knowingly approaching within eight feet of another person near a health care facility for the purposes of displaying signs, engaging in oral protest, education, counseling or passing leaflets or handbills without that person's consent against vagueness, overbreadth and prior restraint complaints.

> The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader 'right to be let alone' the one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.' *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

Hill, 530 U.S. at 716, 717. *Hill* held that the restrictions imposed by the Colorado statute were legitimate protection of the right 'to be let alone' by unwilling listeners. 530 U.S. at 718.

The appellate court's holding in this case that the Rockford ordinance was narrowly tailored to serve the significant government interest of regulating noise because the ordinance prohibits only sounds creating a nuisance is consistent with this Court's holding in *Hill*.

C. The Rockford Ordinance Leaves Open Ample Channels For Communication Of Protected Speech

This Court in *Hill* held that the Colorado statute was narrowly tailored to serve the state's significant and legitimate interest in protecting unwilling listeners and that it left open ample alternative channels for communication. 530 U.S. at 725, 726. This statute restricted display of signs, leafleting and oral speech. In contrast, the Rockford ordinance incidentally affects only oral speech. Display of signs and leafleting, alternate avenues of communication, are not regulated by the Rockford ordinance. Speech that does not rise to the volume level of nuisance noise is not regulated by this ordinance.[2]

III. The Lower Court's Ruling That The Rockford Ordinance Is Not Overbroad Is Consistent With Decisions Of This Court

Overbreadth has been characterized by this Court as "strong medicine", and "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech . . ." *Virginia v. Hicks*, __ U.S. __, 123 S. Ct. 2191 at 2199, 71 USLW 4441 (2003).

2. The Respondent was part of a group of protestors at the clinic. 12/12/01 Tr. 10, 35. The Respondent was the only protestor who received a noise violation complaint. 12/12/01 Tr. 17-18.

This Court has held that " 'particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' " *Hill*, 530 U.S. at 732 [citing *Broadrick v. Oklahoma*, 413 U.S. 601 at 615 (1973)]. As in *Hill*, because any person creating nuisance noise is encompassed within the Rockford ordinance's 'legitimate sweep', the Rockford ordinance is not overly broad.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

KATHLEEN ELLIOTT*
City Attorney
RONALD N. SCHULTZ
Legal Director
CITY OF ROCKFORD
DEPARTMENT OF LAW
425 E. State Street
Rockford, IL 61104
(815) 987-5540

Attorneys for Respondent

* *Counsel of Record*

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In the Supreme Court of the United States

ADRIAN D. HORIEN,

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CITY OF ROCKFORD,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

REPLY BRIEF OF PETITIONER

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

ALAN UNTEREINER*
ARNON D. SIEGEL
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioner

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REPLY BRIEF OF PETITIONER

The City's brief in opposition is most notable for what it does not say. Respondent does not deny that its "nuisance noises" ordinance, which makes it a crime to "annoy" someone with "unusual" or "unnecessary" noise, embodies a "completely subjective standard of 'annoyance.'" *Grayned* v. *City of Rockford*, 408 U.S. 104, 113 (1972). It does not disagree with our showing (Pet. 11-15 & nn. 3-4) that, since *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), scores of state and federal courts – including state supreme courts in Alaska, Colorado, Georgia, Kansas, Mississippi, New York and Rhode Island – have invalidated on vagueness and/or overbreadth grounds local ordinances that punish "annoying" noise or conduct (including ordinances *identical* to Rockford's). Nor does the City deny that the lower court's suggestion that Rockford's ordinance is limited to "common-law nuisance[s]" (Pet. App. 5a) only compounds the fatal ambiguity in the criminal proscription. See Pet. 15-16. And the City does not dispute that there is confusion in the lower courts over whether ordinances such as Rockford's are content-based – and violate the First Amendment when, as here, they are applied to punish criminally the use of an unamplified human voice by someone engaged in protected expression in a quintessential public forum. See Pet. 20-30.

The City's perfunctory submission appears largely aimed at staving off summary reversal. But all of the City's arguments are either meritless or confirm why summary reversal (or, failing that, a grant of plenary review) is warranted in this case.

1. Coates *Is Controlling And Warrants Summary Reversal.* The City maintains (Opp. 2) that *Coates* is not "binding on this case" because the Rockford ordinance is "more comparable" to the sound-truck ordinance upheld in *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). That argument is flawed at every turn.

a. *Coates* involved a Cincinnati ordinance which made it unlawful "'for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner *annoying* to persons passing by, or occupants of adjacent buildings.'" 402 U.S. at 611 n.1 (quoting law) (em-

phasis added). In *Coates*, this ordinance had been used to punish "a student involved in a demonstration" (presumably, against the Vietnam War) as well as "pickets involved in a labor dispute." *Id.* at 612. In similar language, Rockford's "nuisance noises" ordinance makes it unlawful "to cause or create any unnecessary or unusual noise at any time which *annoys*, injures, or endangers the comfort, repose, health or safety of others unless such noise is necessary for the protection or preservation of property or of the health, safety, or life of some person." Pet. App. 14a (emphasis added).

In *Coates*, this Court invalidated the Cincinnati law on both First Amendment and due process grounds because it imposed criminal penalties for conduct that was "annoying" to others. "The First * * * Amendment[]," the Court explained, "do[es] not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people." 402 U.S. at 615. "If this were not the rule," the Court reasoned, "the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct." *Ibid.* "And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement." *Id.* at 616. A criminal proscription against "annoying" conduct is also void for vagueness under the Due Process Clause, the Court held, because it embodies an "unascertainable standard": "[c]onduct that annoys some people does not annoy others." *Id.* at 614; see also *ibid.* (violations of Cincinnati ordinance "may entirely depend upon whether or not a policeman is annoyed").

The Rockford ordinance suffers from exactly the same constitutional defects. At bottom, it too criminalizes conduct because the conduct is somehow "annoying" to others. True, there are several differences between the Cincinnati and Rockford ordinances, but those differences do nothing to cure the vagueness or overbreadth problems that flow from the use of a subjective "annoyance" standard. Respondent emphasizes that the Cincinnati law criminalized annoying "conduct"

(including expressive conduct) whereas the Rockford ordinance criminalizes annoying "noise." Opp. 2. But as explained in the petition (at 12), because noise encompasses *speech* (including, as in petitioner's case, core political speech), this difference only makes the Rockford ordinance *more* problematic. In addition, the Rockford ordinance punishes a broader range of expression since it proscribes, in the alternative, speech and other "noise" that "injures" or "endangers" the "comfort" or "repose" of others. But that additional vague prohibition only compounds the Due Process problem: What does it mean to "endanger" the "repose" of another? That standard is so expansive that it could cover the chime of a doorbell rung by Girl Scouts selling unwanted cookies and virtually any type of telemarketing. See also *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965) (invalidating "breach of the peace" ordinance that made it unlawful to "arouse" another person "from a state of repose").

The Rockford ordinance also differs from Cincinnati's in that it is limited to noise that is either "unnecessary or unusual." But what does *that* mean? And what does it add? Virtually *any* noise that is annoying will also be perceived by the hearer as "unnecessary." Indeed, as we pointed out in the petition (at 13 & n.4), several courts (including the Fourth Circuit) have held that a proscription against "unnecessary" noise creates a vagueness problem of its own. In any event, the lower court clarified that "[a]n 'unnecessary' or 'unusual' noise is one that *is not required to alert others of an emergency*" (Pet. App. 5a (emphasis added)). That limiting construction effectively drains the phrase "unnecessary or unusual" of all limiting effect and independent meaning (given the separate exception for noise that is "necessary for the protection or preservation of property, or the health, safety, or life of some person"). None of these differences in the wording of the Rockford ordinance serves to clarify the meaning of "annoying."[1]

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[1] In other ways as well, the Rockford ordinance sweeps more broadly than the Cincinnati ordinance struck down in *Coates* (and thus risks greater chilling effects). The Rockford law prohibits the annoyance of *anyone* in the City, whereas the Cincinnati ordinance applied only "to persons passing by" the

b. Equally incorrect is the City's suggestion that its ordinance more closely resembles the sound-truck ordinance upheld in *Kovacs* by a 5-4 vote, which made it unlawful

> to play, use or operate * * * on or upon the public streets, alleys and or thoroughfares * * *, any device known as a soundtruck, loud speaker or sound amplifier, or any other instrument * * * which emits therefrom *loud and raucous* noises and is attached to and upon any vehicle operated or standing upon said streets or public places * * * .

See *Kovacs*, 336 U.S. at 78 (quoting law) (emphasis added). In upholding the Trenton ordinance, the plurality noted that it applied only to (a) vehicles, (b) that were being operated on the public streets, and (c) that contained sound amplifiers or other instruments that "emit[] loud and raucous noises." 336 U.S. at 83. "Sound trucks," the plurality explained, still "may be utilized in places such as parks or other open spaces off the streets," where they do not create the same risk of "distractions" that are "dangerous to traffic." *Id.* at 85, 87.

In contrast to the Rockford and Cincinnati ordinances, the Trenton ordinance did not impose criminal punishment for "annoying" other people. On that basis alone, the Trenton ordinance is distinguishable. Beyond that, the Trenton ordinance is different because it narrowly targeted the use of *sound trucks and other mechanical sound amplification devices* in limited circumstances. Respondent attempts to draw a parallel between the conjunctive phrase "loud *and* raucous" (which the Court in *Kovacs* said was not unconstitutionally vague when used to describe prohibited noises made by a sound truck or other ampli-

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offenders and to "occupants of adjacent buildings." The Rockford ordinance applies *anywhere* in the City, whereas the Cincinnati law covered only the "sidewalks, street corners, vacant lots, [and] mouths of alleys." And the Rockford ordinance applies to the "annoying" speech of even a single protester, whereas the Cincinnati law was limited to situations where "three or more persons" were engaged in "annoying" conduct. Although the First Amendment right at issue in *Coates* was principally the rights to free assembly and association and this case involves the right of free speech, that difference is immaterial (and respondent does not contend otherwise).

fier) and the Rockford ordinance's disjunctive reference to "unnecessary *or* unusual" noise. The argument fails for at least three reasons. First, as just noted, the lower court construed "unnecessary or unusual" as meaning "not required to alert others of an emergency" (Pet. App. 5a). So construed, the phrase bears no resemblance to "loud and raucous." Second, even as a matter of ordinary meaning, the two phrases are obviously different; the definiteness of one sheds no light on the definiteness of the other.[2] Third, "loud and raucous" draws special meaning from its context in an ordinance targeting sound trucks and other mechanical sound amplification devices in moving vehicles; "unnecessary or unusual," in contrast, potentially applies to *any* noise made at *any* time in the City of Rockford. See note 1, *supra*.[3]

c. As we showed in the petition (at 11-15), many state and federal courts have followed *Coates* in invalidating on vagueness or overbreadth grounds local ordinances that impose criminal penalties for "annoying" others. This Court has not hesitated to order summary reversal of decisions that ignore *Coates*. Pet. 17 n.6. Notably, some of the lower-court decisions that have invalidated ordinances on the strength of *Coates* have involved laws that were *identical* to the Rockford law at issue here. See *id.* at 12-13. If respondent is correct about *Kovacs*'s meaning, then this uniform body of decisions is wrong – and there is all the more reason why plenary review is warranted in this case. In fact, however, there is good reason why courts

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[2] Contrary to the City's suggestion, "unnecessary or unusual" does not necessarily mean loud – either as a matter of ordinary meaning or under the limiting construction of that phrase adopted by the lower court. Cf. Opp. 2-3 (suggesting that the ordinance "address[es] the volume of the noise"). Rockford knows how to proscribe loud noises – and to do so through precise decibel limitations – and has done so in other provisions of its noise ordinances. See Pet. App. 11a-12a.

[3] Respondent's effort to draw support from *Kovacs* suffers from another flaw: the *Kovacs* majority expressly *distinguished* between laws that restrict the use of sound amplification devices and laws that place restrictions on the unamplified human voice. See Pet. 26.

rarely bother to distinguish *Kovacs* (and this Court saw no reason to do so in *Coates*): *Kovacs* is facially inapplicable.[4]

d. In response to our request for summary reversal on overbreadth grounds, the City falls back on generalities about how that doctrine is "strong medicine" and "rarely" used. Opp. 6. But it never explains why this issue is not squarely controlled by *Coates*. The City suggests that its ordinance is not overbroad because "any person creating nuisance noise" is "encompassed" within its "legitimate sweep." *Ibid.* But the same argument was rejected in *Coates*. See 402 U.S. at 614.

2. *The Lower Court's Misplaced Reliance On Old Illinois Decisions*. As we explained (Pet. 6-7, 15-17), the lower court's reliance on two fifty-year-old Illinois Supreme Court cases was erroneous. In addition to being obviously distinguishable, those cases predate, and have been superseded by, this Court's modern vagueness and overbreadth decisions (including *Coates*). Pet. 9-11, 15-16. And given the indeterminacy of the concept of "nuisance," the lower court's suggestion that the Rockford offense covers only "common-law nuisances" does nothing to ameliorate the vagueness problem.

None of this is disputed by respondent. Taking a page from the lower court's opinion, the City merely asserts that the Illinois courts correctly rejected petitioner's vagueness challenge because "the word 'annoying' had a well-established meaning in the context of common-law nuisance." Opp. 3. If this meaning of "annoying" was so well established, one can only wonder why it was unmentioned in *Coates* and in the scores of lower-court decisions that have followed *Coates*. See also *Saia* v. *New York*, 334 U.S. 558, 560 (1948) (invalidating penal ordinance forbidding use of sound amplification devices

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[4] Notably, the City has abandoned its principal argument below against petitioner's vagueness challenge: that it should be rejected under this Court's decision in *Grayned*. See Resp. C.A. Br. 16-19; Rockford Br. in Opp. to Defendant's Motion, at 4-6. With good reason: As we explained in the petition (at 3 & n.1, 26-27), *Grayned* confirms the invalidity of the Rockford ordinance. See also Brief of Consistent Life *et al.* as *Amici Curiae*, at 3-4.

that produce "sounds" that cause "annoyance" even though ordinance was "dressed in the garb of the control of a 'nuisance'"). Notably, the City makes no effort to explain what this "well-established" meaning is, or why it narrows the criminal proscription in any meaningful way (and neither did the appellate court). Perhaps this is not surprising: the City, after all, never so much as hinted in the lower courts that the word "annoying" had a "well-established meaning" under Illinois common law.[5] Nor was there any hint in Officer McDonald's testimony that he (or anyone else at the Rockford Police Department) limits enforcement of the ordinance to "common-law nuisances." The City cannot even bring itself to assure *this Court* that it will limit enforcement *in the future* to "common-law nuisances."

3. *Content-Neutrality*. In support of our alternative request for plenary review, we showed (Pet. 20-25) that the Rockford ordinance is content-based because it (a) singles out speech (and other noise) based on its effect on the hearer (annoyance), (b) contains a content-based exception for speech "necessary for the protection or preservation of property, or the health, safety, or life of some *person*" (which the lower courts ruled does not protect petitioner because he was attempting to protect unborn children), and (c) criminalizes certain features of verbal expression (here, petitioner's use of a falsetto) that are inextricably connected to a speaker's actual message. We further showed (Pet. 23-24) that the lower courts disagree over whether ordinances proscribing "annoying" noises are content based.

The City has almost nothing to say in response to these arguments. On the merits, it suggests in passing (Opp. 4) that

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[5] On the contrary, the City contended that the ordinance – including the word "annoys" – should be interpreted according to its "ordinary meaning" as reflected in "ordinary dictionary definitions." Resp. C.A. Br. 16-17; see also *id.* at 16 ("'Annoys' means ['disturbs or irritates, especially by repeated acts.'"). In rejecting petitioner's vagueness challenge, the Illinois Appellate Court stated: "[W]e hold that the *plain language* of the noise ordinance gives fair notice to the public and to the City that noise creating a nuisance is prohibited." Pet. App. 5a (emphasis added). Thus, it is far from clear that the lower court actually relied on the "common law" meaning of "annoys."

the Rockford ordinance is not content-based because it applies to noise other than speech, but that is no answer. A content-based restriction on speech does not cease to be so merely because it is included in a law that *also* regulates non-speech conduct or noise. The City also asserts, without explanation, that the Rockford ordinance must be treated as content neutral under this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000). But the law in *Hill* did not have the three attributes mentioned above that render the Rockford ordinance content-based. *Hill* is thus not controlling here.

4. *Time, Place Or Manner Restriction.* As a further reason why plenary review is warranted, we showed (Pet. 25-28) that the Rockford ordinance flunks intermediate scrutiny because it is neither narrowly tailored nor leaves open ample alternative means of communication. In response, the City argues primarily that it has a significant interest in regulating noise. Opp. 5-6. We do not dispute that. The City offers no defense of its ordinance as narrowly tailored – an extraordinary dereliction, given the issues raised in the petition. See Pet. 25-27.

The City does suggest that the ordinance leaves open ample alternative means of communication because Horien could have spoken his message in a conversational tone. Opp. 5-6. That argument ignores the undisputed fact that if petitioner had done so, he would never have been heard by his intended audience – patients some distance away who were entering the clinic from an adjacent parking lot and were disappearing behind a privacy fence – over the din of the counternoise broadcast by the building's owner to drown out the protesters. The City's argument also underscores the difference between this case and *Hill*, where the statute was drafted to ensure that communication in a conversational tone reached the intended audience. See 530 U.S. at 726-27. And there is no support for the proposition (Opp. 6) that the City may prohibit all effective oral speech so long as it permits other methods of communication such as leafleting. See Pet. 27-28. It is not for the City to decide for protesters how they should express themselves.

On the merits, the City also contends that its ordinance withstands constitutional challenge because it protects the rights of "unwilling listeners" and is "designed to ensure that its citizens are not disturbed in their homes and places of business." Opp. 3, 5. The Rockford ordinance, however, does not target listeners in homes or places of business (much less patients in abortion or medical clinics) – and neither is it limited to unwilling listeners. Compare *Hill*, 530 U.S. at 707-08, 715, 718 & n.25 (noting that statute targeted the act of "approaching unwilling listeners" near the entrance to abortion clinics and other medical facilities). The Rockford ordinance covers anyone in Rockford who might be annoyed by noise – whether or not they are willing listeners.[6]

Nor is the City correct in suggesting (Opp. 3 & n.1) that the right to be left alone in one's *home* is implicated by this case. The lower court dismissed as "inherent[ly] implausibl[e]" (Pet. App. 8a; see Pet. 19) the testimony of the complaining witness, Robert Stone, that he had been "annoyed" inside of his home – a full block away, with windows shut, and over the din of floor drum sanders. The Illinois Appellate Court upheld petitioner's conviction for "annoying" *someone else*: Wayne Webster, the owner of the commercial building in which the clinic was located, who also happened to be the person responsible for broadcasting noise at the protesters *to prevent them* from

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[6] If the City is suggesting that *Hill* tacitly overrules *Coates*, *Grayned*, and other decisions of this Court (see Pet. 9-11), the City is simply wrong. In addition, as the Court is no doubt aware, *Hill* has been "condemned by progressive and conservative legal scholars alike[.]" Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31 & n.3 (2003). *E.g.*, Symposium, *The Supreme Court's Most Extraordinary Term*, 28 PEPP. L. REV. 747, 750 (2001) (*Hill* "was slam-dunk simple and slam-dunk wrong") (comments of Laurence H. Tribe); *id.* at 747 (*Hill* "is inexplicable on standard free-speech grounds") (comments of Michael W. McConnell); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) (same). For the reasons ably set forth by these prominent scholars, we believe the Court would be very reluctant to extend *Hill* in the manner implicitly urged by respondent.

communicating with his tenants and the clinic's patients. See Pet. 4-5, 19-20.[7] There was *no* evidence – none – that any patient of the clinic was "annoyed" by petitioner's voice or that the operation of the clinic was in any way disrupted.

5. In *Coates*, this Court warned that laws such as Cincinnati's (and Rockford's) "contain[] an obvious invitation to discriminatory enforcement against those whose [conduct] * * * is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority." 402 U.S. at 616. Whether the complaining party is a segregationist who is "annoyed" by the demands of black citizens marching for racial equality, a neighbor willing to concoct a wild story and call out the police on a protester with whom he disagrees, or even a building owner whose livelihood is negatively affected by protests that cause him expense and "annoyance" (and who attempts to drown out the protesters and prevent them from communicating with others), the risk to free expression is exactly the same. For precisely that reason, a large number of protest groups and civil libertarians from across the political spectrum have joined in an *amicus* brief underscoring the threat such laws present to political freedom and urging this Court not to permit the decision below to stand.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision summarily reversed; in the alternative, the petition should be granted and the case set for briefing and argument.

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[7] The City states (Opp. 3 n.1) that Webster "lives" in the commercial building where the clinic is located, but it neglects to mention that Webster clearly testified he "was in [his] security office" at the time he purportedly suffered "annoyance" as a result of petitioner's protests. 12/12/01 Tr. 25; see also *id.* at 44-46. Webster testified that he had also heard petitioner that day while in the apartment (which was located much further away from the protests), but only because the external PA system Webster used to drown out the protesters also included a microphone system that piped the sound of petitioner's voice into the apartment. See *id.* at 39-40. And, of course, it is undisputed that the clinic was located in an area zoned for commercial use.

Respectfully submitted,

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

ALAN UNTEREINER*
ARNON D. SIEGEL
MAX HUFFMAN
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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In the
Supreme Court of the United States
October Term, 2003

Adrian D. Horien,
Petitioner
v.
City of Rockford, Illinois,
Respondent

On Petition for Certiorari
to the Appellate Court of Illinois, First District

Brief of Consistent Life, Catholic Peace Fellowship, Center for Law and Human Rights, Citizens United for Alternatives to the Death Penalty, Feminists for Life of America, Pax Christi USA, People for the Ethical Treatment of Animals, Sojourners, Daniel Berrigan, Wendell Berry, Abe Bonowitz, Will Davis Campbell, Jim and Shelley Douglass, Thomas Gumbleton, Nat Hentoff, Kathy Kelly, Andy Lipscomb, Martin Sheen, Howard Zinn, Stephen Zunes, et al., as Amici Curiae in Support of Petitioner

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Edward McGlynn Gaffney, Jr.
Valparaiso University School of Law
Valparaiso, IN 46383
219-465-7860
Counsel of Record

Co-counsel listed on inside cover

36 pp

Co-counsel:

William W. Bassett
Univ. of San Francisco
School of Law
2130 Fulton Street
San Francisco, CA 94117
415-422-6625

Joseph Matthias Cosgrove
1460 Wyoming Ave.
Forty Fort, PA 18704
570-823-9078
Counsel for Martin Sheen

Robert A. Destro
Catholic Univ. of America
Columbus School of Law
3600 McCormack Road, N.E.
Washington, DC 20064
202-319-5140

Mary Ann Glendon
Harvard Univ. Law School
Cambridge, MA 02138
617-495-4769

Jeffrey S. Kerr, Esq.
General Counsel,
People for the Ethical
Treatment of Animals
501 Front Street
Norfolk, VA 23510
757-622-7382

Victor Gregory Rosenblum
Northwestern University
School of Law
357 East Chicago Ave.
Chicago, IL 60611
312-503-8443

Gerald F. Uelmen
Santa Clara University School
of Law
500 El Camino Real
Santa Clara, CA 95053
408-554-5729

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Interests of the Amici Curiae

This brief is filed with the consent of the parties. A copy of the consent letters has been filed with the Clerk of the Court. Amici[1] are voluntary associations and individuals committed to principles of nonviolent direct action on a wide range of social issues. Participation in this brief does not necessarily mean that an organization or individual agrees with the substantive views of the petitioner about abortion. Some support and others oppose the views of the petitioner on abortion; still others have no official view on abortion. But all of the amici, whether individuals or communities, join this brief because they agree that imposing criminal penalties on persons who engage in "annoying" speech is clearly at odds with the central meaning of the First Amendment: the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 264, 270 (1964). The particular interests of the amici curiae are stated in Appendix A.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Summary of Argument

I. Petitioner was arrested and convicted under a municipal ordinance making it "unlawful to cause or create any unnecessary or unusual noise at any time which *annoys, injures, or endangers the comfort, repose*, health or safety of others..." Pet. App. 14a (emphasis added). Affirming the conviction, Pet. App. 1a-9a, the intermediate state appellate court completely ignored the controlling precedents of this Court: *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) and *Grayned* v. *City of Rockford* 408 U.S. 104 (1972). It relied instead on two fifty-year-old Illinois Supreme Court decisions predating the relevant decisions of this Court. The Court should grant the petition and summarily reverse.

II. In the alternative, if the Court wishes to treat the First Amendment issue with greater attention by taking this opportunity to reaffirm the principles set forth in *Coates* and *Grayned*, then amici suggest that it is impossible to reconcile the standard of "annoyance" with this country's long history of movements of social protest that have enhanced the protection of life, liberty, and equality in this nation.

III. An additional reason for granting the petition is that the decision of the state court of appeals is at odds with the special solicitude that this Court has shown to including religious speech with the many forms of expression protected in classic public fora, such as sidewalks and streets.

Argument: Reasons for Granting the Petition

1. Amici adopt by reference the statement of facts in the petition. The crucial facts are these. Petitioner Adrian Horien opposes abortion on moral and religious grounds. On the morning of June 8, 2001, he and others stood on the public sidewalk in Rockford, Illinois, near the entrance to a driveway leading to a clinic that provides abortion services. In an effort to communicate the message that abortion is wrong, Mr. Horien called out in a loud, falsetto voice to people entering or leaving the clinic from a parking lot adjacent to the clinic entrance. Pet. 2; see also Pet. App. 1a-4a.

The applicable legal standards are equally straightforward and easy to apply to the facts. The very fact that these standards were ignored below suggests an impermissible viewpoint discrimination, which this Court has repeatedly rejected with particular vigor. *See, e.g., Carey v. Brown*, 447 U.S. 455, 459-71 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 98-102 (1972).

The City of Cincinnati, Ohio, once had a municipal ordinance that punished conduct that was "annoying" to others. This standard is inherently subjective. Since no one faced with such a law could possibly know whether or when he might be breaking it, this Court ruled in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), that a prohibition on annoying others is unconstitutionally vague in violation of the Due Process Clause and unconstitutionally overbroad in violation of the First Amendment. *See also Edwards v. South Carolina*, 372 U.S. 229, 237-38 (1963) (breach-of-the-peace crime was so generalized as to be insusceptible of exact definition); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931) (penal statute which "upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment" of an individual's use of "the opportunity for free political discussion" is contrary to the First Amendment).

In 1972, a year after *Coates*, this Court distinguished *Coates*, sustaining a much narrower Rockford anti-noise ordinance prohibiting the willful making of a "noise or diversion" (a) on property directly adjacent to a school, (b) during school hours, if the noise (c) "disturbs or tends to disturb" the school session. *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). Even with these critical distinctions, the Court acknowledged that that the constitutional question was a very close one. *Id.*, at 109.

In 1974, three years after *Coates*, the City of Rockford, Illinois, adopted a municipal ordinance that reads, in pertinent part: "Sec. 17-10. Nuisance noises. (a) It shall be unlawful to cause or create any unnecessary or unusual noise at any time which *annoys, injures, or endangers the comfort, repose*, health or safety of others unless such noise is necessary for the protection or preservation of property or of the health, safety, or life of some person." Pet. App. 14a (emphasis added); for the full text of the ordinance, see Pet. App. 11a-15a.

In 2001, thirty years after *Coates*, petitioner was arrested and convicted not under the ordinance narrowly sustained in *Grayned*, but under the 1974 Rockford ordinance that is indistinguishable from the ordinance roundly rejected by the Court not only in *Coates*, but also by clear implication in *Grayned*, which distinguished ordinances that rely on a "completely subjective standard of `annoyance,'" from a school disruption ordinance that "prohibited disturbances" that were "easily measured by their impact on the normal activities of the school.." 408 U.S., at 112.

In the appeal that followed, petitioner briefed the state court of appeals on *Coates*, and respondent briefed the court on *Grayned*. In 2002 the state intermediate appellate court never cited or discussed *Coates* and *Grayned* in its opinion, Pet. App. 1a-9a. Instead, it relied on two decisions of "our Supreme Court" [i.e., of Illinois] predating the relevant decisions of this Court, Pet App. 5a, and it affirmed the criminal conviction, Pet. App. 9a. This Court should grant the petition and summarily reverse.

2. As the petition notes, this case comes before the Court in the context of a clear and serious conflict among state courts over the standards that should govern speech on public streets and sidewalks. Pet. 14-21, 36-39. If for this reason the Court wishes to grant the petition and place this case on its docket for argument, the Court should consider the "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Bd. of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). From decades of experience in social protest on a wide range of issues, amici know that a national rule harmonizing the First Amendment with the "completely subjective standard of annoyance," *Grayned*, 408 U.S., at 112, would have a severely chilling effect upon protesters of all stripes.

It is impossible to avoid the deeply conflictual character of American history. The struggle of the united colonies to become the United States was just that, a struggle. After our independence was won, there ensued an enormous divide between Federalists and Anti-Federalists over the ratification of the Constitution. In the same year that the Constitution was signed in Philadelphia, the first abolitionist society was formed in the same city to begin the major struggle over slavery that the Constitution left undone. In the same

era of the founding and the early republic (not, as some might imagine, in the early twentieth century) women began agitating for the abolition of slavery and for the enfranchisement of women. American history is replete with conflicts in which some parties to the contest said and did things that were mightily annoying to their opponents. Major social change is nearly always annoying to those who favor the status quo. Yet this very struggle has been the forge on which our fundamental self-understanding as a community and our most basic and characteristic freedoms have been hammered out.

Americans have been engaged in conflict over basic values in every generation from the founding moment to the present, from the Boston Tea Party through peace protests (notably during the Mexican-American War, the Civil War, World War I, World War II, the Vietnam War, and the on-going War in Iraq), to demonstrations against the New Economic Forum and demonstrations to uphold the rights of animals. Thus the current controversy over abortion is by no means the first volatile issue in the nation, nor will it be the last.

During the Cold War we frequently compared ourselves favorably to totalitarian regimes of the Left and the Right that swallowed up their opposition, sending them to the death camps and the Gulags for extermination. We take some pride in the way we have – by and large – respected the strong voice of protest within our legal and political culture. But Americans have tended to recognize the value of social protest decades after it occurred, when the position the protesters espoused was more broadly received by the people and incorporated into our laws. It is true that harsh penalties were frequently meted out to dissidents, but it is equally true that our dissidents have at many critical turning points of American history helped to shape our destiny.

If the Court grants the petition for plenary review rather than summary disposition, amici will brief this point more fully, offering the Court several illustrations of why the limits on free speech sustained by the state court of appeals are fundamentally at odds with the history of our nation. At this stage of the proceedings, we think it enough to focus the discussion on two aspects of our constitutional history – racial equality and gender equality – and to point to various other volatile issues in which

provocative speech has caused annoyance in the short term and enormous benefit to the health and well-being of our society in the long term.

A. If punishment of annoying ideas had been the law of the land during the period of American slavery and Jim Crow, the overcoming of those twin evils would have been postponed for much longer than the time actually needed to do so.

As Justice Marshall reminded us during the Bicentennial of our Constitution, not everything about this country's past – including slavery and Jim Crow segregation – is cause for rejoicing. Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," 26 Valparaiso U. L. Rev. 21 (1991).

The Rockford ordinance challenged in this case has some nineteenth-century antecedents, but none that are glorious or worthy of emulation. For example, slaveholders found the protest speeches and expressive conduct of the radical Abolitionists mightily "annoying." For this reason the House of Representatives entered an infamous gag order that disallowed the reading of any petitions to the House from citizens seeking that the House abolish slavery in the District of Columbia. As Representative John Quincy Adams noted repeatedly, this gag order was in manifest violation of the First Amendment's protection of the right of the People to petition Congress for a redress of grievance. *See, e.g.*, Michael Les Benedict, *The Blessings of Liberty: A Concise History of the Constitution of the United States* 159-60 (1996).

If the slaveholders who demanded this rule in Congress were annoyed at the suggestion of even such a mild and gradualist an approach to the slavery question, their counterparts in southern legislatures were much more annoyed at more radical proposals – denouncing slavery as immoral and unjust and calling for its immediate abolition – that were mailed from Massachusetts to the Old South. For example, the Commonwealth of Virginia went a step further than the gag rule adopted by the House of Representatives, prohibiting federal officials – postmasters – from delivering mail that opposed slavery. *See* Michael Les Benedict, ed., *Sources in American Constitutional History* 96 (1996). No one goes to such lengths of control who is not deeply annoyed by the ideas he wishes to suppress.

Nearly everyone in America would now regard the eradication of slavery as the just and rightful repudiation of a brutal and inhuman labor system. Some might claim that slavery might have been abolished earlier and with less bloodshed on the battlefields of the Civil War if the Abolitionists had been more accommodating to their adversaries, but this revisionist view overlooks the rigid mindset of the slaveholders who would brook no compromise on the matter of slavery as an "inalienable property right" bound up in their minds with an intractable position on state sovereignty.

The most famous of the Abolitionists, William Lloyd Garrison, was uncompromising in his campaign for immediate and complete abolition of slavery. In the first issue of *The Liberator* (Jan. 1, 1831) Garrison renounced his previous position of gradual abolition and publicly asked "pardon of my God, of my country, and of my brethren, the poor slaves, for having uttered a [gradualist] sentiment so full of timidity, injustice and absurdity." And he wrote: "urge me not to use moderation in a cause like the present! I am in earnest. I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD" (emphasis in original), as cited in Louis Ruchames, ed., *The Abolitionists* 31 (1963). The extent to which the abolitionists became more "in earnest" is the extent to which they became more and more annoying to their opponents.

Garrison served as President of the American Anti-Slavery Society from 1843 to 1865. The society radically challenged the morality of owning a human being, and thus undermined the validity of the slaveowners' constitutional argument that they had a "property" interest in their "chattels personal." *See, e.g.,* Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (2d ed. 1974). As Garrison had promised in the first issue of *The Liberator*, he became louder and clearer on the evil of slavery. On July 4, 1854, he told a mass meeting of over 10,000 abolitionists in Framingham, Massachusetts: "We have degenerated in our reverence for the higher law of God." *See* Philip S. Paludan, *A Covenant with Death: The Constitution, Law and Equality* 2-3 (1975); John T. Noonan, Jr. and Edward McGlynn Gaffney, Jr., *Religious Freedom* 263-64 (2001). Garrison then burned a copy of the Fugitive Slave Act of 1850. Echoing the

covenant renewal ceremonies in ancient Israel, Garrison stated: "And let the people say Amen" (*see, e.g.*, Deut. 27). The people did. Garrison then set fire to a copy of the order of a federal court in Boston that Anthony Burns – a black Baptist preacher who had escaped from his master in Richmond – be returned to his "legal owner." Again Garrison cited Moses: "And let the people say Amen." They did. Garrison then held up a copy of the Constitution, which he denounced as "the parent of all other atrocities." Citing the prophet Isaiah (Is. 28:15), he called the Constitution with its compromise on slavery "a covenant with death, a compact with hell." As he burned the Constitution, he shouted out: "So perish all compromises with tyranny! And let all the people say Amen." Again the large crowd roared out their assent in the single biblical word "Amen."

Were not Garrison's speeches and communicative acts profoundly annoying to Southern slaveholders, even to many Northerners? Yet would anyone in today's constitutional culture now seriously argue that speech of this sort should be unprotected on that ground alone it is annoying?

Garrison and the radical Abolitionists were ultimately heard. As Garrison accurately predicted in the opening issue of *The Liberator*, "POSTERITY WILL BEAR TESTIMONY THAT I WAS RIGHT" (emphasis in original), as cited in Louis Ruchames, ed., *The Abolitionists, supra* at 31. Although not all of the acts of the Abolitionists would gain support even today, the basic thrust of their movement has now clearly prevailed in the Thirteenth Amendment and in the statutes enacted by Congress under its enforcement provision.

After the Civil War, the nation experienced a powerful movement to rebuild or reconstruct our constitutional order, ridding it of the racial injustice that had marred it from the outset. See, e.g., Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998). For a variety of reasons, mainly ignoble, this movement was aborted as part of the Compromise of 1877. *See, e.g.*, Eric Foner, *Reconstruction, America's Unfinished Revolution 1863-1877* (1988); Edward McGlynn Gaffney, Jr., "History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court," 25 Cath. U. L. Rev. 207 (1976). We are now more committed than ever to the

enforcement of the Civil War Amendments that would have been inconceivable without the firm resolve of the "Radical Republicans" of the late 1860s and the early 1870s. But was not their agenda annoying to most Southerners, including Andrew Johnson of Kentucky, the President they sought to impeach?

The Jim Crow system was as iniquitous at its core as it was violent in the pattern of enforcement by the government at the state and local levels. *See, e.g.*, C. Vann Woodward, *The Strange Career of Jim Crow* (3d ed. 1974). In the face of such systemic violence imbedded in the law, the Civil Rights Movement was remarkable precisely for the commitment of its leaders, principally Dr. Martin Luther King, Jr., to Gandhian nonviolence. But as Dr. King made clear in his famous Letter from Birmingham Jail, nonviolence did not mean obeying unjust laws. On the contrary, King and his followers in the Southern Christian Leadership Conference frequently challenged the brutality of the existing legal order in a manner that was annoying to public officials as different as Presidents Kennedy and Johnson, FBI Director J. Edgar Hoover, and Governor George Corey Wallace. *See, e.g.*, Taylor Branch, *Parting the Waters* (1988).

In *Edwards v. South Carolina*, 372 U.S. 229 (1963), this Court reversed the convictions of black protesters who marched upon the State Capitol to protest segregation. Was not the entire message of these protesters annoying to the state officials to whom they wished to present their grievances? The obvious to this question is found in the record in *Edwards*, where the government labeled the demonstration as "boisterous" and "flamboyant" conduct, and described a black preacher's fervent admonition to justice as a "religious harangue," and where objection was even taken to "loudly singing ... patriotic and religious songs, while stamping their feet and clapping their hands." *Id.* at 233; see also *Cox* v. *Louisiana*, 379 U.S. 536 (1965). This Court taught in *Edwards* that any penal statute which "`upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment" of an individual's use of "the opportunity for free political discussion," is contrary to the First Amendment. *Id.* at 238 (quoting *Stromberg* v. *California*, 283 U.S. 359, 369 (1931).

Was not the refusal of Rosa Parks to sit at the back of the bus annoying to the officials of Montgomery, Alabama? Were not

the sit-ins at lunch counters annoying to Woolworth's and to city officials all over the old South? Were not the freedom riders and the marchers from Selma annoying to Governor Wallace? Was not Dr. King's march through the neighborhood of Richard J. Daley annoying to the Mayor of Chicago? No one would seriously maintain that Dr. King or his colleagues in the SCLC confined their protests to ones that refrained from annoying others. On the contrary, Dr. King repeatedly failed to meet the standard imposed on free speech by the ordinance sustained by the state court of appeals. The ruling in this case would have thrown an enormous obstacle in the path of the Civil Rights Movement.

The nation is now better off because of the movements to abolish slavery and to end Jim Crow law. Both of these movements faced steep opposition from those who wished to maintain the status quo. The opponents of these movements could easily have crushed the protesters if the feeble theory of free speech adopted by the state court of appeals had been available to them during these conflicted periods of American history.

B. If the view of the state court of appeals had been the law of the land during the period of feminist insistence upon full participation in the rights and obligations of citizenship, equal justice under law for women and men would have taken much longer than the two centuries it took to achieve.

Many scholars have noted strong parallels between the slavery system and the abusive treatment of women as "chattels personal" subject to the common law of coverture. *See* Michael Les Benedict, ed., *Sources in American Constitutional History* 70-72 (1996).

As early as the 1770s, women voiced the desire to participate in the franchise and to share in all of the obligations of citizenship. They were excluded from doing so on the basis of the theory of virtual representation, the theory that founders rejected when they repudiated the imperial rule of Great Britain over the American colonies. *See, e.g.,* Declaration of Independence, 1 Stat. 1 (1776); Linda K. Kerner, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* 3-33 (1998).

As with the struggle to abolish slavery and then to eradicate the legal structure of apartheid, the effort to change the inequality between men and women under the law of this land was a

prolonged and intense controversy. The feminists of the nineteenth century may not be contained within rosy-tinted portraits. Susan B. Anthony is rightly remembered as the principal advocate for the enfranchisement of women. She was also an agent of the American Anti-Slavery Society. In this capacity she urged an audience before the Civil War to "overthrow this government, commit its blood-stained Constitution to the flames, blot out every vestige of that guilty bargain of the father." As cited in Alma Luz, "Susan Brownell Anthony," in Edward James, ed., 1 *Notable American Women, 1607-1950: A Biographical Dictionary* 53 (1971).

The Declaration of Sentiments drafted by Elizabeth Cady Stanton and adopted at Seneca Falls in 1848 remains the classic statement of the mistreatment of American women. In this document nineteenth-century feminists bore powerful witness to the injustice of rules of law imposed upon women without their consent by all-male legislatures in which they had neither voice nor vote. *See* Michael Les Benedict, ed., *Sources in American Constitutional History* 72-74 (1996). Although a few men, notably Frederick Douglass, attended the convention and supported the Declaration, most men found the Declaration annoying or simply ignored it.

Eight decades after the adoption of the Nineteenth Amendment we now take for granted that women should be able to vote. But advocacy of this view was never easy, and men who opposed the "outlandish idea" of gender equality found deeply annoying the demands of nineteenth-century feminists to be included within the full meaning of the People who ordain and establish the Constitution of the United States. U.S. Const., Preamble. How else can one explain the egregious judicial misconduct of a member of this Court, Justice Ward Hunt, who presided over the government's trial of Susan B. Anthony on charges of voting fraud? Hunt disallowed the introduction of any exculpatory evidence, refused to allow Anthony's counsel to make closing argument, and directed the jury to enter a verdict of guilt without any opportunity to reflect upon the evidence. When Anthony rose to tell the jury her views on the constitutionality of her action, the justice demanded seven times that Anthony sit down and be silent, warning her that "The Court can not allow the prisoner to go on." After she finally sat down, Hunt required her to

stand up to hear her sentence. After he imposed a fine, Anthony told Hunt: "May it please your honor, I shall never pay a dollar of your unjust penalty.... I shall earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim, that 'Resistance to tyranny is obedience to God.'" As cited in David Weber, ed., *Civil Disobedience in America: A Documentary History* 185-88 (1978).

The views of Anthony and other like-minded women were ultimately vindicated by the ratification of the Nineteenth Amendment enfranchising women 133 years after the signing of the Constitution. But in the long interval between these events, the overwhelming majority of men turned a deaf ear to the overwhelming majority of the annoying demands of women for inclusion within the People who form in this republic "a more perfect Union, establish Justice, [and] insure domestic Tranquility." U.S. Const., Preamble.

More recently, women engaged in demonstrations and sit-ins reminiscent of those that occurred during the Civil Rights Movement of the 1960s. If the crabbed view of free speech espoused by the state court of appeals had been the law of the land in any of these eras, it would probably have taken much longer to achieve the prohibition of employment discrimination on the basis of gender contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other important legislation promoting the equality dignity of men and women in our republic; *see, e.g.*, Equal Pay Act, 29 U.S.C. § 206, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.

C. Many other movements of social protest have engaged in speech and expressive conduct that was annoying to the powers that be at the time of these protests. Harsh criticism of monopoly capitalism was voiced in the late nineteenth and early twentieth century not only by obscure pamphleteers, *Abrams v. United States,* 250 U.S. 616, 628 (1919), but also by "the most famous of American literary figures, whose books were read by millions: Upton Sinclair, Jack London, Theodore Dreiser, Frank Norris." Howard Zinn, *A People's History of the United States* 322 (1999). But the works of the muckrakers were not punishable on the ground that they were "annoying."

In the early twentieth century some labor leaders engaged in radical criticism of the economic order that prevailed at the time. For example, in 1905 the founding convention of the Industrial Workers of the World declared: "The working class and the employing class have nothing in common. There can be no peace as long as hunger and want are found among millions of working people, and the few, who make up the employing class, have all the good things of life." As cited in Howard Zinn, *A People's History of the United States* 330 (1999).

The milder AFL deliberately eschewed any connection with socialist ideas such as worker ownership of what they produce with their labor. But Samuel Gompers' famous reply to what workers want – "More!" – does not fully describe the persistent protest of organized labor over the terms and conditions of employment. A fair reading of labor history discloses that unions have sought not only to gain higher wages and benefits for workers, but also to challenge deplorable exploitation of children by employers. For example, Mother Mary Jones, a white-haired organizer for the United Mine Workers of America, is best remembered for organizing the children's march on Washington in 1903 to demand an end to child labor. *See, e.g.,* Howard Zinn, *A People's History of the United States* 346 (1999); see also at 347 (arrest record of IWW organizer Elizabeth Gurley Flynn for annoying speeches that would now be fully protected under the First Amendment and applicable labor laws).

Both before and after the Norris-LaGuardia Act, 29 U.S.C § 101, prohibited courts from entering "labor injunctions," and both before and after the National Labor Relations Act, 29 U.S.C. § 151 et seq., protected picketing as a legitimate tool of labor protest, unions have engaged in speech that "annoyed" corporate managers such as Andrew Carnegie and Henry Ford. There may be reasons why the First Amendment may not fully protect all forms of "speech plus" that unions have engaged in, but this analysis surely does not turn on whether a union has "annoyed" management.

Mass demonstrations against the Vietnam War were surely annoying to Presidents Johnson and Nixon, but it was precisely in this context of agitated protest that this Court refined First Amendment law in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and expressly rejected the power of municipal government to punish

speech that was "annoying." *Coates, supra*, and *Grayned, supra*. These precedents are all the more important now that the nation is engaged in another war that has elicited mass protests in many cities throughout the land. *See, e.g.*, Manny Fernandez And Justin Blum, "Thousands Oppose A Rush To War; Chill Doesn't Cool Fury Over U.S. Stand On Iraq," *Washington Post*, Jan. 19, 2003.

Other examples of social protest include public demonstrations by persons with disabilities. For example, when this Court was hearing oral argument in *Vacco v. Quill*, 521 U.S. 793 (1997), many persons gathered in front of this Court and shouted repeatedly "We're not dead yet!" Supporters for the respondents or maybe even some members of this Court might have found these words "annoying," but no one on the Court or among those gathered in front of the Court thought that a feeling of "annoyance" sufficed to trigger an arrest to stop such speech. *See United States v. Grace*, 461 U.S. 171 (1983) (speech on public sidewalk around the Supreme Court is protected). And persons with disabilities have lodged vigorous complaints against both public officials and private parties for alleged failures to comply with provisions of the Americans with Disabilities Act. *See, e.g.*, "Demonstration for Disability Rights," *New York Times*, May 15, 2001. From the perspective of those on the receiving end of these criticisms, such speech may be "annoying," but that surely cannot be the basis for the arrest and criminal conviction of the speakers.

Animal rights activists have taken their messages to the streets in vivid protests, speaking out against animals having their throats cut while still fully conscious on slaughterhouse "kill lines," animals raised for their fur being anally and genitally electrocuted to avoid "damaging the product," elephants being beaten with whips and bull hooks to force them to perform degrading and unnatural tricks in circuses, and animals being poisoned and tortured in useless consumer product experiments. Undoubtedly, this speech is "annoying" to those that profit from such animal exploitation. Indeed, one of the purposes of the annoying speech is to convince those industries to lessen or end the animal abuse. But such annoyance has never been subject to criminal sanctions in this nation, at least not "while this Court sits."

It is profoundly out of kilter with this nation's history to suggest, as the state court of appeals did here, that a city ordinance

that permits the punishment of "annoying" speech is constitutional on its face.

3. Another reason for granting the petition is that the decision of the state court of appeals is inconsistent with the commitment to our "first freedom," religious liberty. It is undisputed that the petitioner engaged in his speech and communicative acts because he "opposes abortion on moral and religious grounds." Pet. 2.

The protection of religious freedom, including religiously motivated speech on matters of public concern, is at the very core of the Bill of Rights. The English Act of Toleration of 1689 extended privileges to Protestant dissenters from the officially established Church of England. Colonial Virginia accepted the statute, but required dissenters to apply for permits to preach and to build meeting houses. Some, such as the Presbyterians, did so. Others, such as the Separate Baptists, who appealed to lower class whites with evangelical enthusiasm, refused to seek permission from the government to announce their version of the Gospel, and from 1770 on, were subject to persecution. *See* H.J. Eckenrode, *Separation of Church and State in Virginia: A Study in the Development of the Revolution* 30-37 (1910). In 1771 a Baptist preacher in Caroline County was hauled off in the middle of his sermon and flogged by the sheriff. To protest the outrage, Baptists organized the largest mass meeting in Virginia history to that date in a church near the home of James Madison. *See* Rhys Isaac, "The Rage of Malice of the Old Serpent Devil," in Merrill Peterson and Robert Vaughan, eds., *The Virginia Statute for Religious Freedom* 139-69 (1988).

The editors of Madison's papers note that "religious issues, more than tax and trade regulation disputes with England" loomed large in Madison's consciousness in the critical decade of the break from England. William Hutchinson and William Rachal eds., 1 *Papers of James Madison* 107 (1962). On his way to the colonial capital at Williamsburg, Madison later saw a half dozen itinerant Baptist preachers incarcerated in Culpepper County, Virginia, for the "crime" of preaching without a license.[2] Madison found this

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2 In the struggle for religious freedom in the thirteen original states, the licensing, restriction, and regulation of itinerant preachers was a pressing issue that demanded constitutional reform. Itinerant preachers

experience a jarring one. It impelled him to protect the "full and free exercise of religion" in Virginia's Bill of Rights in 1776, and to embark on a career of public service that led to his drafting of the Constitution in Philadelphia in 1787, and to drafting and securing the passage of the Bill of Rights in the First Congress in 1789. *See* John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* 68 (1998), and John T. Noonan, Jr., and Edward McGlynn Gaffney, Jr., *Religious Freedom* 160-63 (2001).

In several cases applying the Religion Clause of the First Amendment to state interference with our first freedom, this Court has protected religious speech on public streets, even though it was manifestly annoying to passersby who invoked state power to stop it. For example, three Jehovah's Witnesses, Newton Cantwell and his sons Jesse and Russell attempted to proselytize residents of a New Haven neighborhood in which about 90% of the residents were Roman Catholics. Two Catholics to whom Jesse Cantwell played a phonograph record called "Enemies" were "incensed" at this attack on the Catholic religion. But this Court reversed the criminal conviction of Jesse Cantwell for inciting a breach of the peace by those who heard the annoying message of the Witnesses. *Cantwell v. Connecticut*, 310 U.S. 296, 301, 303 (1940). Members of this Court have at times found the behavior of the Witnesses to be "provocative, abusive, and ill-mannered," not to mention "unpopular, annoying, or distasteful." *Murdock v. Pennsylvania*, 319 U.S. 105, 115-16 (1943), *see id.* at 166-82 (Jackson, J.,

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were condemned for being arrogant, fanatical, intolerant, uneducated, and mercenary. States passed laws restricting preaching to designated pulpits, licensing and registering preachers, and regulating the qualifications and decorum of preachers. *See* Thomas J. Curry, *The First Freedoms* (1986), at 69-70 (New York), 99 (Virginia), 118 (Connecticut), 171 (Massachusetts); S. Cobb, *The Rise of Religious Liberty in America* (1902), at 126 (North Carolina), 174, 202-03 (Massachusetts), 273 (Connecticut), 317-18, 334-35, 344, 349-53 (New York), 390-94 (Maryland). With the end of establishment and the adoption of free exercise provisions in the various state constitutions, the right to proclaim the gospel in unconventional, unsettling, and "annoying" ways became recognized as one of the most fundamental elements of religious freedom.

dissenting). But this did not keep the Court from guarding their liberties.

After *Cantwell* and *Murdock*, this Court has, for the most part, declined to exclude religious speakers from equal access to a public forum. *See, e.g., Niemotko v. Maryland,* 340 U.S. (1951) (religious groups are entitled to use city streets and parks for meetings and rallies); *Poulos v. New Hampshire*, 345 U.S. 395 (1953 (same); *Widmar v. Vincent* 454 U.S. 263 (1981) (religious speakers have equal right of access to campus of state university); and *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (sustaining Equal Access Act). In particular, the Court has acknowledged that sidewalks "by long tradition or by government fiat have been devoted to assembly or debate." *Perry Education Assn, v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983), and has protected the access of religious speakers to sidewalks even in a town that was wholly owned by a coal company. *Marsh v. Alabama*, 326 U.S. 501 (1946) (overturning the criminal conviction of a Jehovah's Witness for trespass on private property).

As noted above, the Court expressly applied this line of authority to religiously inspired and religiously led civil rights protesters against Jim Crow laws. *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Cox v. Louisiana*, 379 U.S. 536 (1965).

This Court should grant the petition not only to instruct lower courts that laws like the Rockford ordinance might be misused to squelch the free exercise rights of unpopular religious minorities, but also to reaffirm clearly that the strong presumption in favor of First Amendment-protected activities in public fora cannot be the subject of criminal penalties under vague laws such as this.

Conclusion

In 1974 the City Council of Rockford enacted the ordinance at issue in this case with apparent disregard for the teaching of the Court in *Coates, supra,* and *Grayned, supra.* In 2001 the Rockford police relied on this flawed ordinance rather than on the teaching of this Court. In 2002 the state court issued an opinion that completely ignored this Court's teaching in *Coates* and *Grayned.*

This case thus provides the Court with a vehicle to remind public officials in all three branches of government that the oath of office they take to support the Constitution, U.S. Const., Art. VI, contains an implicit duty to conform their legislation and executive actions to the teachings of this Court on the requirements of the First Amendment. *See, e.g.*, Justice Sandra Day O'Connor, Remarks at Opening of National Constitution Center, Philadelphia, July 4, 2003.

The decision below places unconstitutional limits on protected nonviolent protest activity in which the amici have engaged and plan to engage in the future. This Court should grant the writ and either summarily reverse or put the case on its docket to clarify once again that ordinances punishing "annoying" speech are utterly inconsistent with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 264, 270 (1964).

Respectfully submitted,

Edward McGlynn Gaffney, Jr. *
Valparaiso University School of Law
Wesemann Hall
Valparaiso, IN 46383
219-465-7860
* *Counsel of Record*

Co-counsel:

William W. Bassett
Univ. of San Francisco
School of Law
2130 Fulton Street
San Francisco, CA 94117
415-422-6625

Joseph Matthias Cosgrove
1460 Wyoming Ave.
Forty Fort, PA 18704
570-823-9078
Counsel for Martin Sheen

Robert A. Destro
Catholic Univ. of America
Columbus School of Law
3600 McCormack Rd., N.E.
Washington, DC 20064
202-319-5140

Mary Ann Glendon
Harvard Univ. Law School
Cambridge, MA 02138
617-495-4769

Jeffrey S. Kerr, Esq.
General Counsel
People for the Ethical
Treatment of Animals
501 Front Street
Norfolk, VA 23510
757-622-7382

Victor Gregory Rosenblum
Northwestern University
School of Law
357 East Chicago Ave.
Chicago, IL 60611
312-503-8443

Gerald F. Uelmen
Santa Clara University School
of Law
500 El Camino Real
Santa Clara, CA 95053
408-554-5729

Appendix A
Particular Statements of Interest of Amici Curiae

Communities and Voluntary Associations

As noted in the text of the brief, amici are voluntary associations and individuals who engage in protest on a wide variety of issues. Because Consistent Life organized the participation of these amici in this brief, it is listed first. All the rest of the communities and individuals are listed alphabetically.

Consistent Life is a coalition of individuals and organizations working to promote the consistent life ethic. Its members are committed to the protection of life, which is threatened in today's world by war, abortion, poverty, racism, the arms race, the death penalty and euthanasia. They believe that these issues are linked under a consistent ethic of life. They challenge those working on all or some of these issues to maintain a cooperative spirit of peace, reconciliation and respect in protecting the unprotected. *Carol Crossed* (the former executive director), *Mary S. Rider* (the current executive director), and *Ruth Enero* (former president of the Board of Directors) have frequently engaged in public demonstrations relating to the issues listed above. All three are married women and mothers of many children.

Agape is a community of faith in Franklin, Louisiana, that witnesses for peace and justice through nonviolence. It engages in education of its members and the public, especially on the death penalty, through publishing booklets, brochures, and treatises on how to effect change through raising public awareness and consciousness about issues of justice and peace.

Allies for Peace is a San Francisco-based organization promoting peace and animal rights.

Catholic Peace Fellowship [CPF] is a nationwide organization of Catholics committed to peacemaking in the name of Christ. CPF engages in educational projects about peace and nonviolence, and it supports those who stand for peace by virtue of conscience. For example, some members of CPF have engaged in nonviolent demonstrations protesting laws and policies inimical to peace in today's world.

The Center on Law and Human Rights in Cokedale, Colorado, provides legal services for persons and groups whose human rights are threatened or have been infringed. For example, its cases include immigration law issues and victimization under the PATRIOT Act. The Center also publishes books on peaceful resolution of the conflict in the Middle East.

Citizens United for Alternatives to the Death Penalty [CUADP] is a national organization that works to end the death penalty in the United States through aggressive campaigns of public education and the promotion of tactical grassroots activism. CUADP takes no position on the abortion issue. It does not endorse or support the stand of the defendant on that issue, nor does it necessarily approve of his tactics or actions. It supports the defendant's appeal to the U.S. Supreme Court strictly as a legal matter, urging the Justices that no one should be punished for conduct that is merely "annoying" to others.

The Conference of Major Superiors of Men serves the leadership of Catholic orders of over 25,000 vowed religious priests and brothers in the United States. The Justice and Peace Division provides a voice for these communities throughout society in witnessing against capital punishment, war, poverty, and any issue that threatens life. The civil rights of free speech and assembly are crucial to effective action against oppression. These civil rights are threatened by the criminalization of speech or conduct that is "annoying" to others.

Dorothy Day Catholic Worker House [DDCW] in Washington, D.C. is a community founded by Dorothy Day and Peter Maurin to bear witness to the Gospel that identifies service to the hungry, the thirsty, the homeless, and the imprisoned as a way of recognizing the presence of God in categories of human need. The community provides hospitality to homeless families while working to address the root causes of homelessness. Committed to following the teachings of Christ on nonviolence, the community sponsors a weekly vigil for peace at the Pentagon as well as numerous other demonstrations against war and militarism, poverty and abortion. Other communities in the Catholic Worker network signing this brief include: the *Casa Juan Diego* (Houston, Texas); *Fr. Charlie Mulholland Catholic Worker House* (Garner, North Carolina); *Ithaca, New York Catholic Worker*; the *Los Angeles*

Catholic Worker; *Mary's House* (Birmingham, Alabama); *Peter Maurin Farm* (Marlboro, NY); *St. Francis Catholic Worker Community* (Columbia, Missouri); *St. Francis and Therese Catholic Worker House* (Worcester, Massachusetts); the *St. Joseph House of Hospitality* (Rochester, New York); and the *Silk Hope Catholic Worker* (Silk Hope, North Carolina).

Embrace a Consistent Ethic participates in ongoing peaceful public witness against all forms of taking human life, including opposition to war, capital punishment, euthanasia, abortion, racism and poverty. The members of this community believe that the imposition of criminal penalties on a protester solely because he or she "annoys" someone else is an unconstitutional abridgment of freedoms secured by the First Amendment.

Feminists for Life of America [FFLA] is a national organization with headquarters in Washington, DC. It is a pro-woman, pro-life organization that advocates for change for women and their children. *Feminists for Life of New York*, an affiliate of FFLA, advocates protection for women and their children on issues such as domestic violence, child abuse, and child welfare rights. Each month they participate in a vigil to protest the death penalty.

The Peter Maurin Center in Washington, D.C. was established in 1997. The center seeks to contribute to creating a "society where it is easier to be good" (1) by evangelization in the Catholic Worker tradition, (2) by carrying out the works of mercy through operating a furniture and household goods exchange, (3) by organizing for peace and justice through solidarity with the people of Puerto Rico in their effort to de-colonize, and (4) by work for the abolition of the death penalty. If the government may punish conduct it deems "annoying," it will be able to single out and criminalize movements for social change virtually at will. To concede such power to the government renders democratic practices timid and superficial and essentially disempowers the People in the political process. To protect popular, and especially unpopular, political expression, these effects of the Rockford ordinance must be nullified.

Pax Christi USA is a national Catholic peace movement of 14,000 members committed to the gospel imperative of seeking peace through nonviolence. The members of this association promote peace through personal and social transformation. They

frequently engage in nonviolent protest of policies that undermine peace and justice. The members of the Pax Christi affiliate chapter in Birmingham, Alabama also join this brief.

People for the Ethical Treatment of Animals [PETA] is a charitable organization exempt from taxation pursuant to Internal Revenue Code Section 501(c)(3). As the world's largest animal rights organization, PETA is dedicated to exposing and ending animal exploitation and suffering wherever it occurs consistent with its belief that animals are not ours to eat, wear, experiment on, or use for entertainment. An integral part of PETA's ability to educate the public about the plight of animals is the vigorous use of fundamental free speech activities, including peaceful protests, street-theatre style demonstrations, leafleting, and aggressive social debate. Ordinances, such as the one at issue in this case, that seek to punish "annoying" speech directly threaten PETA's charitable activities.

Plowshares is a coalition of religious believers who seek to enflesh the words of the prophet Isaiah 2:4, "They shall beat their swords into plowshares, and their spears into pruning hooks. Nation shall not take up sword against nation and neither shall they study war anymore." The movement was founded by Daniel Berrigan, S.J., a leader in the opposition to the Vietnam War. Fr. Berrigan joins this brief in his individual capacity, as do the following Plowshares Activists: Peter DeMott, Bruce Friedrich, Ellen Grady, Paul Magno, Patrick O'Neill, and Kathy Boylan Shields. All of these activists have spent many years imprisoned for their nonviolent protest against war, but none of them thinks it is permissible for the government to punish speech it deems "annoying" to others.

Sojourners is a Christian ministry whose mission is to proclaim and practice the biblical call to integrate spiritual renewal and social justice. In response to this call, we offer a vision for faith in public life, including publishing Sojourners magazine, preaching, teaching, organizing, and public witness. Members of Sojourners seek to be guided in their lives and work by the biblical principles of justice, mercy, and humility. Sojourners has at times organized and participated in public protest activities, and thus has a vital interest in this case.

Vieques Support Committee is an organization that has helped to organize protests against repeated bombing of Vieques Island in Puerto Rico by the United States Navy.

Voices in the Wilderness is a group that seeks to end the economic sanctions against the people of Iraq. The group sends delegations to Iraq to break the siege and bring desperately needed medical supplies to children and families. It has also sponsored demonstrations against the ongoing sanctions, including week-long fasting outside the headquarters of the United Nations in New York.

Witnesses for Reconciliation was formerly the Committee of Southern Churchmen that was founded in the 1960 to promote the work and vision of Dr. Martin Luther King, Jr., and to advance his cause of nonviolence. The Committee promoted, participated in, and led marches, sit-ins, boycotts, and the freedom rides. Today it is small but continues to advance the cause of civil and political rights for minorities.

Individuals

David Atwood is the director of the Texas Coalition to Abolish the Death Penalty Pax Christi of Texas. This group regularly organizes demonstrations against the death penalty in Texas.

Donald Bauer is a Catholic priest who served as a member of the New York State Labor and Religion Coalition since its inception, and who worked tirelessly for farmworker wage equity and other issues on behalf of the poor. He also was appointed to the Congress on Racial Equality and in both of these capacities used public witness to educate and challenge the public.

Michael Baxter, C.S.C. is a theology professor at the University of Notre Dame, and the national president of the Catholic Peace Fellowship.

Wendell Berry is an author, farmer, English professor, and poet. As a long-time conservationist and small farm advocate, he has written many books deploring the loss of family farms and rural jobs to farm factories. He is the recipient of many awards, including the Lyndhurst Foundation Prize and the Jean Stein Award from the American Academy of Arts and Letters.

Abe Bonowitz is the director of Citizens United for Alternatives to the Death Penalty [CUADP], a national organization that works to end the death penalty in the United States through aggressive campaigns of public education and the promotion of tactical grassroots activism. While CUADP takes no position on the abortion issue, Bonowitz is pro-choice and, therefore, he is in profound disagreement with the petitioner on that issue and deplores the violent tactics that some abortion opponents have been known to employ. He supports this appeal only because, as a legal matter, the First Amendment should shield protesters who are merely "annoying" from arrest and criminal prosecution.

Roy Bourgeois, M.M., is a Maryknoll priest who, after years as a foreign missionary in Central America, founded the School of the Americas Watch [SOAW], a loose coalition of citizens concerned about the widespread abuse of human rights – including torture and murder of religious leaders and labor leaders throughout Central and South America – by foreign military officers who study at the U.S. Army School of the Americas at Ft. Benning, Georgia. Each November – on the anniversary of the assassination of seven Jesuit priests and their domestic workers in San Salvador by graduates of the School of the Americas – SOAW organizes a major demonstration at Ft. Benning against the negative effects of this program upon peace and justice in our hemisphere.

Bernard Broussard is founder of *Starthrowers*, a human rights organization based in Louisiana. He has played a leading role in community organization on behalf of the civil rights of African Americans in Louisiana since the mid 1960s. From that time to the present, he continues to challenge through marches, demonstrations, holding prayer meetings on behalf of the oppressed in the South.

Will Davis Campbell is a writer, lecturer, and long time supporter of the Civil Rights Movement who helped escort African-American children when they tried to integrate a Little Rock, Arkansas high school back in 1957. A founding member of Dr. King's Southern Christian Leadership Conference, he became the Executive Director of the Committee for Southern Churchmen, which is now known as Witnesses for Reconciliation.

Thomas Cornell is the founder of the Catholic Peace Fellowship and an ordained deacon in the Catholic Church. He is

the editor of *The Catholic Worker*, a newspaper of national circulation founded by Dorothy Day, and he lives at the Peter Maurin Farm in Marlboro, New York.

Stephen Dear is the executive director of People of Faith Against the Death Penalty, a state-wide organization with headquarters in Carrboro, North Carolina.

Richard Deats is the editor of *Fellowship* magazine, published by the Fellowship of Reconciliation [FOR], the largest, oldest interfaith peace organization in the United States. Since 1915 FOR has carried on programs and educational projects concerned w domestic and in peace and justice, nonviolent alternatives to conflict, and the rights of conscience. It is the American affiliate of the International FOR, which has affiliates in more than 40 countries.

Heather DeMian is a disability and homeless rights activist. Born with Ehlers-Danlos Syndrome, which requires her to use wheelchairs and service dogs, she manages the Interfaith Day Center for the homeless of Columbia, Missouri; and she assists with the Loaves & Fishes Soupkitchen operated by the St. Francis House Catholic Worker Community. She is a member of the disability rights organizations, *Not Dead Yet!* and *Americans Disabled For Accessible Public Transit* [ADAPT].

Jeff Dietrich is a founding member of the Los Angeles Catholic Worker, and the editor of *Catholic Agitator*. He has participated in scores of peace demonstrations and actions in support of justice.

Jim and Shelley Douglass are peace activists who co-founded Mary House, a Catholic Worker community in Birmingham, Alabama. They are also the co-founders of Ground Zero Center for Nonviolent Action. They believe that to bolster any one party's mental security in a controversy by destroying an opponent's right to dissent can undermine the most basic human freedoms secured by the Constitution.

William and Eugenia Durland are the co-founders of the Center on Law and Human Rights. They believe there is a danger that, in the wake of September 11, our constitutional protections will be eradicated in the name of a security state. In this context it is especially important to reaffirm that the First Amendment prohibits punishment of speech that is merely "annoying."

Mary Anne Flores, *Clare Grady*, and *Jessica Stewart* are members of the *Ithaca Peace Community*, a group that expresses concern about social justice issues and facilitates the representation of those who would otherwise remain voiceless and unheard in our society. These three women have engaged in nonviolent direct action that has led to their arrest for trespass upon government property. For example, they have served sentences for trespass at the Hancock Airfield in Syracuse, NY, in order to protest the ongoing bombing of the people of Iraq.

Thomas Gumbleton is a Catholic bishop in the Archdiocese of Detroit, Michigan, and a founder of Pax Christi, USA. He was a leading voice urging the United States Conference of Catholic Bishops to issue its statement in 1971 collectively opposing the Vietnam War on the ground that the war could no longer be justified under the principles of the just war tradition. Bishop Gumbleton has worked and visited in poor and war-torn countries in Latin America and the Caribbean and is deeply concerned with human rights violations around the world. He holds a deep belief in the power of nonviolence to effect social change.

Nat Hentoff is a renowned civil libertarian who has served on the national board of directors of the American Civil Liberties Union. He is a nationally syndicated columnist and author.

Kathy Kelly, a three-time Nobel Peace prize nominee, is co-founder and co-coordinator of voices in the wilderness, a national organization of peace activists which has organized delegations to visit the people of Iraq with small amounts of medical supplies to children and families in need. kathy and voices organized iraq peace team delegations who have lived alongside ordinary Iraqis before, during, and after the "shock and awe" bombardments, and they continue efforts of outreach and education to teach peace and to foster non-violent resistance to war.

Lana Jacobs received the Martin Luther King Award from Companions of Shalom for her work with the inner-city in Columbia, MO, where she lives in community with the poor. Ms. Jacobs has been arrested numerous times for nonviolent direct actions defending the homeless and hungry. Each month she engages in some form of public protest against military build-up, which in her view robs the poor of what they rightfully deserve.

Andy Lipscomb is a member of *Witnesses for Reconciliation*, a board member of *Consistent Life*, and a long-time activist for civil rights.

Deborah McEvoy, is a member of *Feminists for Life of America* and of the Detroit Peace Community. In her role as a health professional, she supports the needs of women and their children through petitions, public advocacy and demonstrations.

Rachel MacNair, a Quaker, is the founder and director of *the Feminism and Nonviolence Studies Association*. She is the author of *The Psychology of Peace: An Introduction.*

Barry Nakell is an attorney in North Carolina actively engaged in the defense of civil liberties for decades as a member of the American Civil Liberties Union, and as a former professor of law at the University of North Carolina at Chapel Hill. Mr. Nakell is of the view that the use of a municipal ordinance banning "annoying" speech and conduct is a severe infringement on the rights secured in the United States Constitution.

John W. Oliver was the coordinator of the Orthodox Peace Fellowship in North America from 1999 to 2003. He is professor emeritus of History at Malone College.

Michele Pflaum is the President of *The Center for Reflection on the Second Law*, and a longtime environmental activist, working with groups such as *Earth First!*

Scott and Claire Schaeffer-Duffy are co-founders of the Saints Francis and Therese Catholic Worker in Worcester, MA, a lay Catholic pacifist community which offers hospitality to homeless men and women. They also publish the *Catholic Radical*, a bi-monthly journal of opinion. Scott has lectured extensively at colleges and universities throughout New England on the value of nonviolent direct action.

Martin Sheen is an actor who has participated for nearly two decades in protests against weapons of mass destruction and in demonstrations pertaining to homelessness and other issues of social justice.

John Stoner is a member of Mennonite Central Committee, a traditional peace church. He is the founder of *Every Church a Peace Church*, a movement to share the convictions of the Anabaptist community with all other Christian churches.

Andrew L. Sullivan served as the Chair of the Libertarian Party of Nebraska from 1999 to 2001. Without nonviolent action, people will passively accept government oppression no matter how severe, or be propelled directly into violent action, for the penalty for actions of nonviolence would become essentially the same as violent actions.

Lenore Yarger is a long-time advocate for the poor. She has traveled to Iraq with the organization *September 11 Families for a Peaceful Tomorrow.*

Harry E. Yeide, Jr. is a Professor of Religion at George Washington University, with a special interest in Ethics and Peace Studies.

Howard Zinn is a Professor of History at Boston University. He has written over a dozen books that deal in some way with protest movements in American history. Two of these books most closely related to the theme of this brief are *Disobedience and Democracy* (1968), and *A People's History of the United States* (3d ed. 1999).

Stephen Zunes is a Professor of Political Science at the University of San Francisco. He is the principal editor of *Nonviolent Social Movements* (1999). His research interests have included the impact of grassroots political movements on policy and government.

Mark and Louise Zwick are the founders of Casa Juan Diego. They engage in a ministry of service to refugees from Latin America, providing them with hospitality, medical services, and other works of mercy. In addition, they engage in advocacy for human rights of refugees.